

# REVIEWING THE PROPOSED REVISIONS TO THE U.S. FISH AND WILDLIFE SERVICE MITIGATION POLICY

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## HEARING

BEFORE THE

### SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE

OF THE

### COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

### UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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SEPTEMBER 21, 2016

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## **REVIEWING THE PROPOSED REVISIONS TO THE U.S. FISH AND WILDLIFE SERVICE MITIGATION POLICY**

**WEDNESDAY, SEPTEMBER 21, 2016**

U.S. SENATE,  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,  
SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE,  
*Washington, DC.*

The Committee met, pursuant to notice, at 2:30 p.m. in room 406, Dirksen Senate Office Building, Hon. Dan Sullivan (Chairman of the Subcommittee) presiding.

Present: Senators Sullivan, Whitehouse, Barrasso, Boozman, Wicker, Fischer, Inhofe, Cardin, and Gillibrand.

### **OPENING STATEMENT OF HON. DAN SULLIVAN, U.S. SENATOR FROM THE STATE OF ALASKA**

Senator SULLIVAN. The Subcommittee on Fisheries, Water, and Wildlife will now come to order.

I first want to apologize to everybody. We are trying to schedule some votes, especially to my colleagues, that we are going to be voting at 2:15, but I guess we are pushing that back. So my apologies.

I want to thank everybody for being here to discuss what I think is an exceptionally important issue, the Fish and Wildlife Service proposed revisions to its mitigation policies and the impacts these could have on projects, economic projects, across the United States, including in my home State of Alaska.

I know some of you have had to come from far away and shuffle competing demands on your schedule on short notice, so I very much appreciate everybody being here at the hearing.

And I want to begin by saying something I think is pretty obvious on this Committee, but it is important to mention at the outset. We all certainly want to protect our wildlife, our environment. In my State, that is something that is near and dear to everybody, and we certainly have a strong record of doing that in Alaska, but we also need to take care of our citizens with economic opportunity.

So this hearing gives us a chance to review the Service's broad proposal that has the potential to extend the scope of Federal review and consideration of infrastructure, energy, and private development and land use projects throughout the Nation.

The Fish and Wildlife Service proposal, when added to the existing number of procedural and resource reviews for Federal actions and permits for private development, will increase costs, delay, or possibly paralyze projects, essentially withdraw lands, and discour-

age needed investment in many States. In short, broadly crafted and poorly explained policy proposals like the Service's proposed revisions may have significant economic impacts on economic growth and opportunity while doing little to protect the environment and the species.

This is not some theoretical concern. For example, burdensome regulations and delays have created delay after delay on many large scale resource and economic development projects in our country. On average, right now it takes 5 to 6 years to permit a bridge. Just to permit a bridge in the United States. Permitting a highway project can often take twice as long, up to 10 years. Again, just for the Federal permits.

More specifically we had a case of the airport runway expansion at Sea-Tac Airport in Seattle; testimony on the Commerce Committee. Fourteen years to get the Federal permits. In Alaska it took 7 years, \$7 billion to get an oil company to get one permit for an exploration well. Seven years. And we had a goldmine that took almost 20 years to go through Federal permitting.

A recent report for the American Society of Civil Engineers found that there is an over \$1.4 trillion funding gap for needs of infrastructure spending through 2025 for the United States. That is \$1.4 trillion worth of roads, water, wastewater, basic utility, airport and port repairs, and investments that will be required to meet our Nation's infrastructure needs in the next decade.

We all want to do that. We all need to think through the important ways to do that.

In some places these U.S. investments will rebuild crumbling bridges and roads. But in other places, like my State, there is no infrastructure, no roads, no water and sewer projects in communities; and these infrastructure projects are necessary for lower priced goods, medicine, electricity, and water.

On top of all these investments, our Nation still needs to strategically explore and develop energy resources, all types of energy resources, whether renewables or oil and gas.

Again, when projects like roads or power lines are delayed or not built, it is often the most economically disadvantaged of our citizens who are hurt the most. I see this on a very regular basis in Alaska.

As drafted, the Service's proposed revisions will add more complexity to the dizzying array of regulatory requirements, big and small, that all projects must face. The Fish and Wildlife Service is proposing to potentially veto projects by requiring a "no action" alternative in some cases.

Let me be clear. The Fish and Wildlife Service has no authority under the law to veto an economic development project, period. There is none.

Alaska's unique situation also raises concerns under the Fish and Wildlife Service broad revisions. Alaska was recently recognized by the Supreme Court in the Sturgeon case is different from the rest of the country in regards to our lands. Eighty-eight percent of Alaska is public lands, with only 1 percent private sector ownership lands. Large proportions of these lands are undeveloped. Alaska contains more wetlands than the rest of the United States' States combined.

Yet the proposed revisions are completely silent on the unique differences posed in Alaska or other States that have unique circumstances.

Finally, as noted above, the scope of the authority asserted by the Service in its proposal is exceptionally broad and far from clear. The Service bases its authority to implement its new net gain or no net loss policy on no less than 26 statutes. It is a fundamental principle of administrative law that agencies must only exercise the authority delegated to them by Congress. It should cause us all concern, all my colleagues, that its own grant of authority from Congress to be implemented for policy revisions is so unclear at this stage of the proposal.

I would like to conclude by just noting after the President's 2015 memo on mitigation, Federal agencies have been piling on additional regulatory requirements and served as so-called guidance and regulatory mandates. Such guidance must be authorized by Congress in Federal statute, and it must allow for not delay or prohibit economic opportunity that Americans so desperately need.

I have serious doubts that this guidance meets either of these critical requirements and look forward to asking questions about these issues. Thank you.

Senator Whitehouse.

**OPENING STATEMENT OF HON. SHELDON WHITEHOUSE,  
U.S. SENATOR FROM THE STATE OF RHODE ISLAND**

Senator WHITEHOUSE. Thank you, Chairman.

We are here today to examine the Fish and Wildlife Service's proposed revision to its mitigation policy. The Fish and Wildlife Service is the Federal Government's lead agency for protecting the plants, fish, and wildlife held in trust for the public. The agency has statutory authority to make sure there is a mitigation plan to protect natural resources affected by any development performed or funded by the Federal Government or that requires a Federal permit.

The Fish and Wildlife Service is still operating under a mitigation policy that hasn't been updated since the first year of the Reagan administration.

In the past 35 years we have made significant advances in the science of endangered species, habitat conservation, and climate change. For one thing, the Service is relying on a document that predates the first intergovernmental panel on climate change report by 9 years. We are now at the fifth iteration of that report.

The revisions under review today are needed to bring the Fish and Wildlife Service into the 21st century and ensure that it provides consistent guidance on protecting America's natural spaces and native wildlife from a multitude of dangers, including those from climate change.

In my home State of Rhode Island, we have already seen winter surface water temperatures increase by around 4 degrees Fahrenheit since the 1960s. Sea level at the Newport Naval Station tide gauge is up almost 10 inches since the 1930s. In a State tied so closely to its oceans and coasts—in 2013, Rhode Island's ocean economy generated \$2.1 billion—these changes are serious. Rhode

Island is not alone in seeing climate change undermine its natural resources, wildlife, and economy.

I appreciate the Service's efforts to better incorporate the latest climate change science into its mitigation policy, and I encourage it to be more specific about accounting for climate change and resiliency in mitigation plans, some of which can cover decades of effort and monitoring.

There is no question as to the Service's authority to promulgate the proposed revisions to its mitigation policy. The Fish and Wildlife Service cites 20 separate laws, 7 executive orders, and a multitude of regulations and administrative guidance documents that support its proposal.

In his presidential memorandum from November 2015, the President set clear expectations for the Department of Interior and other Federal agencies to "avoid and minimize harmful effects to land, water, wildlife, and other ecological resources caused by land and water disturbing events, and to ensure that any remaining harmful effects are effectively addressed consistent with existing missions and legal authorities."

The memorandum specifically calls for the use of landscape scale planning which coordinates mitigation projects on a larger scale to enhance conservation goals, and of policies to "establish a net benefit goal, or at minimum a no net loss goal for natural resources."

With these proposed revisions to its mitigation policy, the Fish and Wildlife Service has set high expectations for its review of mitigation projects. This long overdue update is necessary to bring the Service's mitigation policy into the modern era and to provide increased consistency and transparency for non-Federal entities that work with the Fish and Wildlife Service and other Federal agencies.

I thank our witnesses for being here today and look forward to the testimony.

Thank you, Chairman.

Senator SULLIVAN. Thank you, Senator Whitehouse.

We do have two distinguished panels here today, and I want to thank, again, the witnesses for being here.

I want to welcome our first witness, Mr. Michael Bean, who is the Principal Deputy Assistant Secretary for the Fish and Wildlife Service and Parks at the Department of Interior.

Mr. Bean, you will have 5 minutes to deliver an oral statement, and a longer written statement will be included in the record.

**STATEMENT OF MICHAEL BEAN, PRINCIPAL DEPUTY ASSISTANT SECRETARY, FISH AND WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR**

Mr. BEAN. Thank you, and good afternoon.

Senator SULLIVAN. Excuse me, Mr. Bean. I apologize, but I think the vote has started, and as opposed to trying to cycle us through, if we can recess for a quick 10 minute recess, we will be back to hear your opening statement. Again, I apologize for the delay at the hearing.

Thank you.

[Recess.]



Senator SULLIVAN. OK, we will reconvene the Subcommittee on Fisheries, Water, and Wildlife.

Again, thank you for your patience, everybody. Apologize for that recess.

Mr. Bean, the floor is yours for 5 minutes.

Mr. BEAN. Thank you, sir.

Chairman Inhofe, Chairman Sullivan, Ranking Member Whitehouse, members of the Subcommittee, it is a pleasure to have the opportunity to testify before you today regarding the proposed mitigation policies of the U.S. Fish and Wildlife Service. I am Michael Bean, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks at the Department of the Interior.

Mitigation is an important and longstanding means of reconciling development activities with the conservation of fish and wildlife in their habitat. Mitigation encompasses a wide range of activities, including measures to avoid adverse impacts to wildlife, measures to minimize impacts that cannot practically be avoided, and measures to offset or compensate for those that remain.

The Service generally plays one of two roles with respect to mitigation. In one it recommends to other agencies the mitigation measures that contribute to the achievement of priority conservation goals pursuant to a variety of statutory authorities. Examples are its recommendations pursuant to the Fish and Wildlife Coordination Act or the National Environmental Policy Act, NEPA.

In other cases, the Service functions as a regulatory authority and requires mitigation measures of its permittees under various statutes that it administers. For example, permits issued under section 10 of the Endangered Species Act for take of listed species resulting from otherwise lawful development activities require applicants to minimize and mitigate the impacts of their projects to the maximum extent practicable. That is the statutory standard.

Mitigation is not a new responsibility for the Service. The Service has been authorized by Congress to recommend measures to mitigate the impact of water resource development projects since the Fish and Wildlife Coordination Act of 1934, more than 80 years ago. Decades of experience with mitigation under the Coordination Act, NEPA, and other laws led the Service to formulate a general mitigation policy in 1981.

Recently, the Service has proposed two major policy documents relating to mitigation. The first, published last March, is a comprehensive revision of its 1981 gentle mitigation policy. The second, published in early September, is a stepdown policy specific to compensatory mitigation under the Endangered Species Act. Both were published in the Federal Register for public review and comment.

With respect to the revised general mitigation policy, the Service is now evaluating comments received. With respect to the ESA compensatory mitigation policy, the comment period will remain open through October 17.

The Service's two recent policy proposals were informed by its own practical experience and the evolution of mitigation science and policy since 1981. The goal of both policy proposals is to make mitigation recommendations and requirements more predictable, consistent, transparent, and effective. Neither policy proposal represents a radical departure from prior practice.

Several key principles guide both proposed policies. They reaffirm the importance of the longstanding mitigation hierarchy in which practicable measures to avoid impacts are taken first, followed by measures to minimize those impacts that cannot practically be avoided, and finally measures to compensate for remaining impacts, if any.

They emphasize the benefits of compensatory mitigation being done in advance of impacts. The proposed policies urge a broader look at where in the relevant landscape compensatory mitigation can have the greatest benefit to the affected resource, broadening the frame beyond the impact site.

Recognizing that there are a variety of mechanisms for compensatory mitigation, including permittee of responsible mitigation, conservation banks, in-lieu fee programs, and habitat exchanges, the proposed policies make clear that regardless of the mechanism chosen, equivalent standards must be applied, creating a level playing field where the market-based mechanisms can flourish.

Finally, the proposed policies set a goal of improving, or at a minimum maintaining, the current status of important, scarce, or sensitive resources as allowed by applicable authority and consistent with the responsibilities of action proponents.

It is vitally important that we get the greatest conservation value for each mitigation dollar expended. The proposed policies are intended to improve the effectiveness of mitigation investments while at the same time improving the consistency, predictability, and transparency of mitigation decisions and providing opportunity for market-based mitigation mechanisms to achieve their full potential.

Thank you for this opportunity to testify on the Service's proposed mitigation policies. We especially appreciate the opportunity to hear and discuss your interest in them. I would be glad to answer any questions you may have.

Thank you.

[The prepared statement of Mr. Bean follows:]

**TESTIMONY OF MICHAEL J. BEAN,  
PRINCIPAL DEPUTY ASSISTANT SECRETARY  
FOR FISH AND WILDLIFE AND PARKS,  
U.S. DEPARTMENT OF THE INTERIOR,  
BEFORE THE U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,  
SUBCOMMITTEE ON FISHERIES, WATER AND WILDLIFE CONCERNING THE U.S.  
FISH AND WILDLIFE SERVICE MITIGATION POLICY**

September 21, 2016

Chairman Inhofe, Chairman Sullivan, Ranking Member Whitehouse, and Members of the Subcommittee, I am Michael J. Bean, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks at the Department of the Interior (Department). It is my pleasure to testify before you today regarding the U.S. Fish and Wildlife Service's (Service) mitigation policies and practices. The Service is the oldest Federal conservation agency, tracing its lineage back to 1871, and it is the only agency in the Federal government whose primary responsibility is management of biological resources for the American public. The Service helps ensure a healthy environment for people by protecting species whose decline may signal the degradation of natural resources we need, like water quality, and by providing opportunities for Americans to enjoy the outdoors and our shared natural heritage. The Service is responsible for implementing some of our Nation's most important and foundational environmental laws, such as the Endangered Species Act (ESA), the Bald and Golden Eagle Protection Act, and the Migratory Bird Treaty Act (MBTA). The Service manages the National Wildlife Refuge System, the world's premier network of public lands comprised of over 941.6 million acres devoted to the conservation of wildlife and habitat. The Service works in partnership with the states to protect and restore nearly 1,600 animals and plants listed under the ESA and to protect and conserve just over 1,000 species of birds under the MBTA.

The success of fish and wildlife conservation under the Service's statutory authorities depends in part on the careful planning of development projects that could otherwise negatively impact fish and wildlife species. Recognizing this, the Service has, for decades, sought to facilitate responsible development through the application of mitigation. The term "mitigation" refers to a hierarchical approach to project development that first avoids and then minimizes adverse impacts to protected resources -- for example through project siting and the application of best management practices to project design and operation -- and, finally, applies compensatory offsets where adverse impacts cannot be avoided. Under its 1981 mitigation policy and in partnership with other federal agencies, the states, Tribes, and affected industries, the Service has worked successfully with project proponents on innovative mitigation measures to address a variety of resource challenges, including water supply management, hydropower generation, oil and gas development, solar energy generation, energy distribution, and other industries or land use changes that can result in mortality of protected species or damage to their habitat. Earlier this year, the Service published a proposed revision of its 1981 mitigation policy.

The proposed revised policy creates no new authority; the proposed revisions are based on existing law and are consistent with the Service's existing, statutory authorities, as well as Federal regulations and policies that direct the Service's work. It is intended to serve as an over-arching Service guidance applicable to all actions for which the Service has specific authority to recommend

or, in limited cases, to require mitigation of impacts to fish, wildlife, plants and their habitats. As proposed, the policy would also serve as a single umbrella policy under which the Service could issue more detailed policies or guidance documents covering specific activities in the future.

The Service also recently published a proposed Endangered Species Act compensatory mitigation policy (CMP). The CMP is a step-down policy that provides clear and consistent measures to address anticipated but unavoidable adverse impacts of proposed actions on threatened or endangered species, species that have been proposed to be so listed, and designated or proposed critical habitats. It updates and replaces the Service's 2003 Guidance on the Establishment, Use and Operation, of Conservation Banks and the 2008 Recovery Crediting Guidance. Most significantly, the draft CMP moves the Service from project-by-project compensatory mitigation to strategic mitigation planning at the landscape level.

The proposed revisions to the 1981 mitigation policy and proposed CMP are consistent with and fulfill a requirement in the *Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment* (Section 4(c), November 3, 2015), and comply with the Secretary of the Interior's Order 3330 entitled *Improving Mitigation Policies and Practices of the Department of the Interior* (October 31, 2015) and the Departmental Manual Chapter (600 DM 6) on *Implementing Mitigation at the Landscape-scale* (October 23, 2015). They both also fulfill deliverables identified in the Department's Energy and Climate Change Task Force 2014 report, entitled *A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior*, that seeks to implement the guiding principles set forth in the Secretarial Order.

The majority of the Service's existing authorities for engaging in mitigation processes are advisory, providing the agency the ability to recommend measures that will assist agencies and project proponents avoid, minimize and compensate for impacts to fish and wildlife. The proposed policies being considered today were crafted to improve the Service's long-standing mitigation efforts by supporting the application of consistent principles and standards throughout its programs and across all of the lands managed by the agency.

#### **Background: U.S. Fish and Wildlife Service Mitigation Policy and Practice**

The common sense conservative practice of assessing damages to natural resources anticipated by planned human activities, and recommending measures to mitigate anticipated damage, is not new. This practice was mandated by Congress, beginning with the Fish and Wildlife Coordination Act of 1934 (Coordination Act). The Coordination Act included requirements that were the first formal expressions in law of a duty to minimize the negative environmental impacts of major water resource development projects and to compensate for those impacts that remained – giving birth to the core ideas of what we now label as environmental mitigation.

The Coordination Act was a response to an era of big dam building and reflected a concern for the impact of those dams on salmon and other anadromous fish. As originally enacted, it required consultation with the Bureau of Fisheries (as the Service was then known) prior to the construction of any dam to determine if fish ladders or other aids to migration were necessary and economically

practical to minimize impacts on fish populations. It also required provision for the opportunity to use the impounded waters for hatcheries to offset impacts that could not otherwise be avoided.

The duties imposed by the Coordination Act were reinforced and expanded by the National Environmental Policy Act of 1969 (NEPA). Under NEPA and its implementing regulations, all federal agencies have a duty to assess the impacts of the major actions they propose to undertake and to consider reasonable alternatives to reduce or eliminate those impacts. The Service, as the federal agency charged by Congress in the Fish and Wildlife Act of 1956 with the responsibility for management, conservation and protection of fish and wildlife resources, routinely recommends mitigation measures to other federal agencies through the NEPA process.

The experience gained in implementing the Coordination Act and NEPA informed the promulgation by the Service of a formal mitigation policy in 1981. The following year, in 1982, Congress gave a significant new mitigation responsibility to the Service when it amended the ESA to authorize permits allowing the taking of endangered species incidental to otherwise lawful activities. Before it may issue such a permit, however, the Service must find that the permit applicant has developed a conservation plan – or HCP - that will minimize and mitigate the impacts of such taking “to the maximum extent practicable.” These habitat conservation planning provisions of Section 10 of the ESA have proven sufficiently flexible to provide the basis for permitting small, single-landowner development projects and broader regional conservation plans encompassing multiple projects undertaken by multiple landowners or project proponents. To date, the Service has approved over a thousand HCPs, allowing project proponents to proceed with their actions in a manner that balances the needs of ESA-listed species with economic development. This has resulted in the conservation of over 5 million acres.

The proposed, revised mitigation policy applies to those resources identified in statute or implementing regulations that provide the Service authority to make mitigation recommendations or specify mitigation requirements. This is inclusive of, but not limited to, the federal trust fish and wildlife resources concept. The Service has traditionally described its trust resources in general terms as migratory birds, federally listed endangered and threatened species, certain marine mammals, and inter-jurisdictional fish. These covered taxa are, in some cases, narrowly defined or specifically identified in statutes.

The types of resources for which the Service is authorized to recommend or require mitigation also include those that contribute broadly to ecological functions that sustain species, and are referenced in several other statutes. The definitions of the terms “wildlife” and “wildlife resources” in the Fish and Wildlife Coordination Act include birds, fishes, mammals, and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife depend. Section 404 of the Clean Water Act (33 CFR 320.4) codifies the significance of wetlands and other waters of the United States as important public resources for their habitat value, among other functions. The ESA envisions a broad consideration when describing its purposes as providing a means whereby the ecosystems upon which endangered and threatened species depend may be conserved and when directing Federal agencies at § 7(a)(1) to utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of listed species. The purpose of the National Environmental Policy Act (NEPA) also establishes an expansive focus in promoting efforts that will prevent or eliminate damage to the environment, while stimulating human health and welfare. In

NEPA, Congress recognized the profound impact of human activity on the natural environment, particularly through population growth, urbanization, industrial expansion, resource exploitation, and new technologies. NEPA further recognized the critical importance of restoring and maintaining environmental quality, and declared a Federal policy of using all practicable means and measures to create and maintain conditions under which humans and nature can exist in productive harmony. These statutes address systemic concerns and provide authority for protecting habitats and landscapes.

In 1999, the Service published a notice in the Federal Register establishing final policy guidance for compensatory mitigation on National Wildlife Refuges. This policy provides guidance for Service personnel when they are evaluating whether a National Wildlife Refuge should be considered as a site for wetland restoration, enhancement, or creation for compensatory mitigation related to water resource development projects authorized by the Department of The Army under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. In the States of Texas and Louisiana, the Service is allowed to charge, collect, and retain money from parties responsible for damages to National Wildlife Refuges related to the exercise of privately-owned oil and gas rights. These monies can be used to mitigate or restore damaged resources (Pub. L. No. 106-113, 113 Stat. 1535, 1501A-140).

#### **The Need for Revised Mitigation Policy**

The proposed revisions to existing mitigation policy are motivated by conservation challenges, such as increased changes across our landscapes to serve growing human needs for energy, water and other natural resources and the impacts of climate change. In addition, advances in conservation science since 1981 enable us to more precisely assess and address threats to fish and wildlife, plants and their habitats. The revised policies will modernize our approach and will provide more effective and efficient government to the public.

Since the publication of the Service's 1981 Policy, land use changes in the United States have reduced the habitats available to fish, wildlife, and plants. For example, the U.S. Department of Agriculture reports that, by 1982, approximately 71 million acres of the lower 48 States had already been developed. In the United States, between 1982 and 2012, an additional 44 million acres were developed, for a total of 114 million acres developed. Of all historic land development in the United States, excluding Alaska, over 37 percent has occurred since 1982. Much of this newly developed land had previously been habitat, including 17 million acres converted from forests.<sup>1</sup> By 2060, a loss of up to 38 million acres (an area the size of Florida) of forest habitats alone is possible<sup>2</sup>. Attendant pressures on remaining habitats are expected to increase fragmentation, isolation, and degradation through myriad indirect effects. Given these projections and their direct and indirect impacts, the near-future challenges for conserving species and habitats are daunting. As more lands and waters are developed for human uses, it is incumbent on the Service to help project proponents successfully and strategically mitigate impacts to fish and wildlife and prevent systemic losses of ecological functions that support protected species, or species in need of conservation.

<sup>1</sup> U.S. Department of Agriculture. 2015. Summary Report: 2012 National Resources Inventory, Natural Resources Conservation Service, Washington, DC, and Center for Survey Statistics and Methodology, Iowa State University, Ames, Iowa. <http://www.nrcs.usda.gov/technical/nri/12summary>

<sup>2</sup> Environmental Protection Agency. 2013. Our Built and Natural Environments: A Technical Review of the Interactions Among Land Use, Transportation, and Environmental Quality. SECOND EDITION.

Accelerating climate change poses a significant challenge to conserving species, habitat, and ecosystem functions. Climatic changes can have direct and indirect impacts on species abundance and distribution, and may exacerbate the effects of other stressors, such as habitat fragmentation and diseases.

The conservation of habitats within ecologically functioning landscapes is essential to sustaining fish, wildlife, and plant populations and improving their resilience in the face of climate change impacts, new diseases, invasive species, habitat loss, and other threats. Therefore, the proposed revised policy emphasizes the integration of mitigation planning with a landscape approach to conservation. Advances in science since 1981 have enabled us to make much more precise predictions of impacts to fish and wildlife and their habitats from climate change, development activities, and other factors.

Lastly, a number of changes to the Service's mitigation-related authorities since 1981, such as Congress' 1982 amendments to the ESA warrant the revision of existing mitigation policy.

#### **Proposed Revisions to U.S. Fish and Wildlife Service 1981 Mitigation Policy**

These proposed revisions to the 1981 mitigation policy do not create new authority, rather, they seek to direct our mitigation efforts under existing authority in a more effective and efficient way that benefits from experience gained over decades since the policy was first developed. The proposed revisions would provide a framework for applying a landscape-scale approach to achieve, through application of the mitigation hierarchy, a net gain in conservation outcomes, or at a minimum, no net loss of resources and their values, services, and functions resulting from proposed actions. Like the existing agency policy, they would apply to those resources identified in statute or implementing regulations that provide the Service with authority to make mitigation recommendations or specify mitigation requirements for activities that are directly carried out or funded by Federal agencies, non-Federal actions for which one or more of the Service's statutory authorities apply, and the Service's provision of technical assistance to partners.

Specifically, the revisions include clarification of the Service's use of the elements of mitigation in various contexts. They provide guidance for the application of the hierarchical elements of mitigation in circumstances that indicate a diversion from the order in which they are normally presented. For example, compensation may take precedence before avoidance or minimization of impacts when a species occurs at a location that is not critical to achieving conservation objectives for that species and offsetting habitat improvements can be made offsite, or when current conditions are likely to change substantially due to the effects of a changing climate.

Unlike the 1981 policy, the revised policy would explicitly apply to the conservation of species listed as threatened or endangered under the ESA. Mitigation, as broadly defined in the proposed policy, is an essential contribution to the conservation of threatened and endangered species. Effective mitigation can contribute to the recovery of listed species or prevent further declines in populations and habitat resources that would otherwise slow or impede recovery of listed species.

The proposed revisions would also provide an updated framework for applying mitigation measures that will maximize their effectiveness at multiple geographic scales, including a landscape scale. In the proposed policy revision, the Service defines “landscape” as an area encompassing an interacting mosaic of ecosystems and human systems that is characterized by common management concerns. The revisions call for mitigation decisions to be informed by knowledge and assumptions about factors influencing the ability of the landscape to sustain species.

The proposed policy revisions are consistent with the Presidential Memorandum and thus will increase consistency in the application of mitigation, both within the Service and across agencies. For example, the proposed revised policy is aligned with relevant regulations, policy, terminology and approaches applied by Federal agencies under the Clean Water Act. Because most projects involve the authorities of more than one agency, having multiple agency mitigation policies using common principles, terms and approaches will provide greater consistency and predictability for the public.

The revised policy proposes that assessments of environmental impacts be made with the best available science and methodologies that will, for example, allow decision makers, action proponents, and the public to compare present and future conditions; use common metrics; and pursue measures that are cost effective and scaled to the relative impacts to affected resources.

The proposed policy revisions support advance mitigation -- mitigation that is developed before actions are proposed -- particularly in areas where multiple, similar actions are expected to adversely affect a similar suite of species. Advance mitigation plans can more effectively address potential indirect and cumulative impacts of development, and incentivize private investments in pre-development compensation activities, such as mitigation and conservation banking.

The proposed 1981 mitigation policy revisions for compensatory mitigation support a level playing field, or equivalent standards, for mechanisms including proponent-responsible mitigation, mitigation/conservation banks, and in-lieu fee programs. The policy increases public transparency by supporting application of measurable performance standards. Aligning mitigation planning with broader, conservation planning is an example of how the policy as a whole is intended to improve the conservation outcomes the Service pursues with its partners.

Finally, the proposed revised policy provides a description of how it relates to existing Federal statutes, regulations and other policies that authorize the Service’s activities across a range of trust species and policy areas, and it introduces the possibility of additional, focused guidance in the future.

#### **Proposed Compensatory Mitigation Policy**

The first example of a step-down policy under the proposed Service-wide Mitigation Policy is the recently published draft Endangered Species Act – Compensatory Mitigation Policy (CMP), published on September 2, 2016. The proposed CMP is a comprehensive policy that provides detailed guidance for all compensatory mitigation mechanisms used to compensate for unavoidable adverse impacts to listed species and their habitats including, but not limited to, permittee-responsible mitigation, conservation banking, in-lieu fee programs, habitat credit exchanges and



other third party mitigation arrangements that the Service may recommend or require (when necessary and authorized under existing authority) to offset unavoidable adverse impacts to endangered or threatened species (listed species) or other species at risk of being listed as threatened or endangered in the foreseeable future. The proposed CMP would apply to all compensatory mitigation mechanisms that may be proposed by federal agencies or applicants to offset impacts to listed species and/or designated critical habitat, as well as mitigation proposals by mitigation sponsors for conservation banks, in-lieu fee programs and other third party mitigation arrangements.

The proposed CMP aligns the Service's compensatory mitigation recommendations with landscape-level conservation goals to improve ecological outcomes for the species. It also supports the guiding principle included in the Presidential Memorandum, the Department's Secretarial Order, and the Service's proposed revised mitigation policy of ensuring that, at a minimum, an action results in no net loss toward achieving conservation outcomes for affected resources, or a net benefit in conservation outcomes, when that is allowed by applicable statutory authority and consistent with the responsibilities of action proponents.

The draft CMP has a stated preference for compensatory mitigation in advance of unavoidable impacts and encourages consolidating compensatory mitigation on the landscape (e.g., by using conservation banks) when doing so will produce a better ecological outcome for the species.

#### **U.S. Fish and Wildlife Application of Mitigation**

The Service's mitigation authorities are largely advisory, providing the ability to recommend mitigation, including under NEPA, the Clean Water Act, Fish and Wildlife Coordination Act and ESA. The Service's authority to require mitigation is more limited, including the Service's own actions and those instances clearly established by law, such as section 18 fishway prescriptions under the Federal Power Act, and components of our ESA authority. Working within its statutory authority at all times, the Service has a long history of proactively assisting project proponents in the design and siting of proposed projects, so that they have fewer adverse impacts to public trust fish and wildlife resources. For example, the Service's voluntary Wind Energy Guidelines, developed by a FACA stakeholder committee, provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development. They provide developers with resources to evaluate risk and make siting and operational decisions that result in fewer projects planned in high risk areas. They also incorporate best management practices to assist wind energy developers in minimizing impacts to wildlife resources. Avoiding adverse impacts in the first place can reduce the need to take further action to minimize or compensate for such impacts.

Under ESA section 7 the Service has consistently acknowledged and accepted or applied mitigation in the form of: (1) conservation measures voluntarily included as part of a proposed Federal action that avoid, minimize, rectify, reduce, or compensate for unavoidable (also known as residual) impacts to a listed species; (2) components of a reasonable and prudent alternative to avoid jeopardizing the continued existence of listed species or destroying or adversely modifying designated critical habitat; and (3) reasonable and prudent measures within an incidental take statement to minimize the impacts of taking on the affected listed species. Under section 10(a)(2), a non-Federal applicant is required "to minimize and mitigate" such impacts "to the maximum extent

practicable,” among other requirements, to receive an incidental take permit. This policy serves as over-arching Service guidance applicable to all actions for which the Service has specific authority to recommend or require the mitigation of impacts to fish, wildlife, plants, and their habitats, including those covered by the ESA. We intend to adapt Service program-specific policies, handbooks, and guidance documents, consistent with applicable statutes, to integrate the spirit and intent of this policy.

Innovative mitigation approaches are also helping to keep the greater sage-grouse off the list of endangered and threatened species under the ESA, while supporting sustainable economic development across the West. This past September, the Service concluded that the iconic rangeland bird did not warrant protection under ESA, due to the collective efforts by the states, partner agencies, and other stakeholders. The U.S. Forest Service and BLM issued Records of Decision finalizing 98 land use plans to outline a framework for sage-grouse conservation, including required mitigation for certain impacts to greater sage grouse habitat and the commitment to collaboratively develop mitigation strategies with states and partner agencies across the sagebrush landscape. These collaborative strategies will identify and direct mitigation investments to protect and restore sage-grouse habitat in areas of highest ecological value. Two major mining companies, Barrick Gold and Newmont Mining Corporation, at their initiative, have recently entered into innovative mitigation agreements with the Bureau of Land Management and the Fish and Wildlife Service that will further the conservation of the greater sage-grouse. The agreement initiated by the Newmont Mining Corporation includes the State of Nevada.

The Service is committed to working collaboratively and sharing its experience in developing mitigation measures that provide certainty and predictability to project proponents. Under its existing and finalized mitigation policies, the Service will continue its work with partner agencies, including the U.S. Army Corps of Engineers and the Environmental Protection Agency, to create a regulatory environment for project proponents and developers that allows us to build the economy while protecting healthy ecosystems.

### **Conclusion**

Advancing safe and responsible development and promoting the conservation of America’s Federal lands and natural and cultural resources for generations to come is a shared responsibility for all of us. The Service is working to ensure mitigation is applied consistently, predictably, and effectively, so that permit applicants and developers can proceed with projects that achieve their need while protecting our Nation’s valuable natural and cultural resources.

Thank you for your interest and for the opportunity to testify today; I am happy to answer any questions.

**U.S. Senate Committee on Environment and Public Works  
Subcommittee on Fisheries, Water and Wildlife  
September 21, 2016  
Oversight Hearing: “Reviewing the Proposed Revisions to the U.S. Fish and Wildlife  
Service Mitigation Policy.”**

**Questions for the Record Submitted to Mr. Michael Bean**

**Chairman Inhofe:**

**Question 1:**

The Presidential Memorandum directs the agencies to implement mitigation policies consistent with existing authority. The Service’s Mitigation Policy and subsequently issued Compensatory Mitigation Policy adopt a “net conservation gain” or, at a minimum, “no net loss” standard, while the ESA requires mitigation to the “maximum extent practicable.” Does the existing requirement to mitigate to the “maximum extent practicable” limit the application of the newly proposed “net conservation gain/no net loss” and, if so, how?

**Response:** Yes. The statutory standard in the ESA for the mitigation requirements for issuance of a section 10(a)(1)(B) permit is controlling, and the Service could not require a mitigation program to achieve a net conservation gain as a condition for issuance of this type of permit. It is not uncommon, however, for applicants to voluntarily develop mitigation programs that will achieve a net conservation gain for the species in the long run.

**Question 2:**

In the context of the Service’s proposed mitigation policies, how does the Service define “at-risk” species?

**Response:** The Service’s proposed Compensatory Mitigation Policy (81 FR 61058, September 2, 2016) defines at-risk species as, “candidate species and other unlisted species that are declining and are at risk of becoming a candidate for listing under the Endangered Species Act. This may include, but is not limited to, State listed species, species identified by States as species of greatest conservation need, or species with State heritage ranks of G1 or G2.” Candidate species are defined as those plants and animals for which the Service has sufficient information on their biological status and threats to propose them as endangered or threatened under the ESA, but for which development of a proposed listing regulation is precluded by other higher priority listing activities.

**Question 3:**

The Service’s proposed mitigation policies apply to threatened, endangered and “at-risk” species while the protections of the ESA apply only to listed species. What authority does the Service rely upon in extending the protections of the ESA to “at-risk” species?

**Response:** The Service is not extending the protections of the ESA to “at risk” species. We do, however, use our various authorities, such as the Fish and Wildlife Coordination Act, to assist

landowners and other partners in early, proactive conservation efforts for “at risk” species so that their status can be stabilized or improved so that protection under the ESA will not be necessary.

**Question 4:**

The Service admits in its Compensatory Mitigation Policy that its authority to require compensatory mitigation under the ESA is limited but states that it is “recommending” the use of compensatory mitigation pursuant to the Fish and Wildlife Coordination Act and the National Environmental Policy Act. Can you please provide a citation to the specific provisions in both of those statutes that the Service relies upon for such authority?

**Response:**

*Under the Fish and Wildlife Coordination Act 16 USC 662:*

***(a) CONSULTATIONS BETWEEN AGENCIES***

*“Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development”.*

*Congress also included language in the National Environmental Protection Act, Section 101(b)(6):*

*“In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.”*

**Question 5:**

The Compensatory Mitigation Policy states that “The conservation banking model is generally perceived as successful at achieving effective conservation outcomes, and when used in conjunction with section 7 consultations and section 10 habitat conservation plans, has achieved notable regulatory efficiencies.” Can you please provide specific examples that support this statement? In addition, can you please identify the factor(s) employed by the Service to determine whether a conservation bank is a “success” or “failure.”

**Response:** Nationwide, there are 140 Service-approved conservation banks, protecting over 175,000 acres of habitat. We say that conservation banks result in regulatory efficiencies because each conservation bank is set up in advance of the impacts, and provides compensation for multiple projects. As a result, when Service biologists review proposed compensation associated with a biological opinion or habitat conservation plan, they do not need to perform the due diligence screening of a mitigation site, because it has already been done. This provides more timely decisions and greater predictability to project proponents, reduces the Service’s workload, and reduces the time needed to complete environmental reviews. The Service’s

workload is further reduced because the biologists do not need to track the success of multiple mitigation sites, as each bank produces one monitoring report which will cover all of the projects that purchased credits at that bank.

Success of a conservation bank is determined through monitoring the ecological and administrative performance (i.e., does it meet the ecological performance standards established for that bank, and is the endowment funded, conservation easement recorded, etc.), and long-term stewardship (i.e., is the site being managed per the associated management plan, over time) of the bank.

**Question 6:**

The draft Compensatory Mitigation Policy states that “compensatory mitigation” or “compensation” includes any measure that would “rectify, reduce or compensate for an impact to an affected resource.” Can you please explain how the terms “rectify” and “reduce” in this context differs from the terms “avoid” and “minimize”?

**Response:** The Compensatory Mitigation Policy retains our 1981 adoption of the Council on Environmental Quality (CEQ) definition of mitigation, which encompasses all measures to avoid, minimize, rectify, reduce over time through management, and compensate for impacts. The term “avoid” means, in this context, to simply not cause any damage to habitat or species in the path of development or other relevant activity. “Minimize” means to lessen the impacts of an activity as much as is practicable. The term “rectify” means “to correct,” which implies that harmful effects will be corrected, such as through replanting vegetation on a disturbed site. “Reduce” means to lessen the impacts to some degree, such as through the use of sediment curtains.

**Question 7:**

The Service admits that its “authority to require a “net gain” in the status of listed or at-risk species has little or no application under the ESA.” Despite this admission, the Service states that it can “recommend the use of mitigation, and in particular compensatory mitigation, to offset the adverse impacts of actions under the ESA.” Does the Service admit that it cannot require an applicant for a Section 10 permit to a “net gain” or “no net loss” standard as a condition of approval?

**Response:** Yes. The statutory standard for the mitigation requirements for issuance of a section 10(a)(1)(B) permit (i.e. “the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking”) is controlling, and the Service could not separately require a mitigation program to achieve a net conservation gain (or no net loss in some circumstances) as a condition of permit issuance. However, “no net loss” may, in some circumstances, be accomplished under this statutory standard, and it is not uncommon for applicants to voluntarily develop mitigation programs that will achieve a net conservation gain for the species in the long run.

**Subcommittee Chairman Sullivan:**

**Question 8:**

Congress granted authority to the Service for the management of trust resources under the ESA, Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act and Marine Mammal Protection Act. Although Congress has conferred some authority over non-trust resources under other statutes, this authority is limited to particular roles or projects. [For example, although the Fish and Wildlife Coordination Act requires the Service to consult regarding unlisted fish, wildlife, and their habitats, 16 U.S.C. §§ 661-667e, the Service's consultation obligation only relates to water-related projects developed by federal agencies.] In the Draft Policy, the Service asserts that it may recommend or require mitigation for impacts to a broad variety of species and their habitats, including: 1) trust resources, which include migratory birds, federally listed endangered and threatened species, certain marine mammals, and inter-jurisdictional fish; and 2) resources that contribute broadly to ecological functions that sustain species, which include birds, fishes, mammals, all other classes of wild animals, all types of aquatic and land vegetation upon which wildlife is dependent, wetlands and other waters of the United States, the ecosystems upon which listed species depend, and the human environment. See 81 Fed. Reg. at 12,383–84. This second category could capture the entire natural environment in the United States.

- Please explain the statutory authority for the Service to recommend or to require mitigation of impacts to species other than federal trust fish and wildlife resources.
- How does the Service asserting authority over non trust resources traditionally managed by states not conflict with the “broad trustee and police powers” that states enjoy over wildlife and other natural resources within their jurisdiction?

**Response:** There are limited circumstances under which the Service may require mitigation, even to protect Federal trust species. However, in some cases, the Service has authority to provide recommendations, technical assistance and to act as a partner in the conservation of fish and wildlife species, including, but not limited to, those expressly identified as Federal trust wildlife resources. The Service achieves its mission under numerous statutes, some of which involve conservation of non-trust wildlife, as the question notes. For example, the Fish and Wildlife Coordination Act (FWCA) provides the Service authority to make mitigation recommendations whenever a Federal entity proposes or authorizes the modification of a waterbody. Recommendations under FWCA can cover resources as the statute defines, but in practice, Service recommendations are likely to focus on linkages of effects to trust resources, as prioritized by Service field and regional offices.

The Service's final revised agency-wide mitigation policy (81 FR 83440, November 21, 2016)(Policy) applies to the resources as listed or described within the Service's various mitigation authorities. The language used within those authorities to describe the covered resources determines the scope of Service recommendations made under each authority. In the Policy, we note that the Service has traditionally described its trust resources as migratory birds, federally-listed endangered and threatened species, certain marine mammals, and inter-jurisdictional fish. Our engagement in mitigation processes is likely to focus on those trust resources, but where provided by Congress under certain authorities, the Service's recommendations are not strictly limited to covering only trust resources. This Policy does not establish new authority. We respect the role of States and their role in conserving fish and wildlife.

**Question 9:**

The Service has decided to prepare NEPA Environmental Assessments for both its revised Mitigation Policy and its ESA Compensatory Mitigation Policy. For policies with such significant impacts, why hasn't the Service chosen to prepare a more thorough Environmental Impact Statement? Wouldn't that be an appropriate way to evaluate these wide-reaching policies? Is the Service going to give the public an opportunity to review and comment on the NEPA assessments?

**Response:** We analyzed the Policy in accordance with the criteria of NEPA, the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), and the Department of the Interior's NEPA procedures (516 DM 2 and 8; 43 CFR part 46). Issuance of policies, directives, regulations, and guidelines are actions that may generally be categorically excluded under NEPA (43 CFR 46.210(i)). Based on comments received, we determined that a categorical exclusion can apply to the Policy. Nevertheless, the Service chose to prepare an environmental assessment (EA) out of an abundance of caution and to inform decision makers and the public regarding the possible effects of the policy revisions. In our EA, we determined that implementation of the Policy would not significantly affect the quality of the human environment, and as a result, an Environmental Impact Statement was not warranted. The EA is available as a supporting document to the Policy within the docket at <http://www.regulations.gov>.

We are currently preparing an EA on the draft final Compensatory Mitigation Policy. Upon completion of the EA, we will determine if an Environmental Impact Statement is warranted.

**Question 10:**

How will the Service avoid situations where redundant mitigation is required under its requirements and other programs like Section 404 of the Clean Water Act?

**Response:** The Service does not anticipate redundant mitigation being required. The Service routinely coordinates with other agencies on mitigation site approvals for projects that affect multiple resources under the jurisdiction of different agencies. For example, joint conservation/mitigation banks are approved by the Service, U.S. Army Corps of Engineers and Environmental Protection Agency to provide mitigation under ESA and the Clean Water Act. This practice of "joint banking" began so that project applicants would not have to mitigate twice for a single project, streamlining both projects and conservation efforts. The Service will continue working collaboratively with other agencies for all types of mitigation projects, to further this purpose.

**Question 11:**

How is the FWS working with the Natural Resources Investment Center (NRIC) in the creation of these policies? If these policies are finalized, will this office be permanent?

**Response:** The Service's draft and final policies were coordinated with interested bureaus and offices within DOI, including the NRIC. The NRIC is not within the U.S. Fish and Wildlife

Service. The NRIC was established independently, and our mitigation policies will not affect its continued existence.

**Senator Barrasso:**

**Question 12:**

Mr. Bean, we have discussed mitigation before, in an earlier hearing before the Senate Committee on Energy and Natural Resources in March. During that time, we discussed the concept of “irreplaceable natural resources” at length. To date, I do not believe the Department has yet clearly defined “irreplaceable”, instead opting to provide a description of a potentially qualifying resource. In response to my question about the definition of the term, you indicated that “...in some rare cases a mineral resource might indeed be determined, through a public process and consistent with our legal authority, to be an irreplaceable natural resource.” I remain concerned that this description will give agencies unfettered discretion to create a hierarchy of conservation objectives that places public input in direct conflict with sound science. Please describe the role you believe public process should have in the determination of the type and quality of a resource in question.

**Response:** The U.S. Fish and Wildlife Service uses the term “irreplaceable resources” to describe habitats with particular qualities that are required for the survival of Federally-protected species or species that otherwise fall within the jurisdiction of United States conservation statutes, and which, once destroyed or damaged, cannot be replaced or restored on a time scale meaningful to people living today. The role of public input on the determination of whether or not a public resource is irreplaceable depends upon the provisions of the Federal statute under which conservation of it is authorized. This term is included in the Service’s 1981 mitigation policy, and it has been applied in this manner.

Examples of habitats that the Service has considered irreplaceable include Colorado peatlands (or fens) and Hawaiian coral reefs that are centuries or even thousands of years old, structurally complex, and species-rich. In most Colorado peatlands, for instance, peat accumulates at a rate of less than one foot per thousand years and thus, such habitats cannot be restored to their former condition except on a scale of centuries or millennia. For similar reasons, structurally complex, species-rich coral reefs in Hawaii cannot, as a practical matter, be replaced or restored on a time scale meaningful to people living today.

It is important to note that in our revised Policy, we have used the term “irreplaceable” only in association with the term “habitat.” For a resource, mineral or otherwise, to be considered an irreplaceable habitat, it would need to first meet the definition of habitat, as defined in our Policy. Minerals or other substances, by themselves, will not typically meet this definition.

**Question 13:**

The issue of the agency’s statutory authority to implement the draft mitigation policy in the future is critical. Is it the Department’s view that current statute gives the Fish and Wildlife Service the explicit authority to approve or disapprove of a project under another agency’s jurisdiction? If so, does that not then give the agency unfettered authority to interject in any



project, regardless of legitimacy of the objection, if pressed to do so by an outside group? If not, then where does the Service purport that authority rests?

**Response:** The Service implements and enforces Federal conservation laws passed by Congress, as enacted. The Policy does not create or assume new authority for making mitigation recommendations. In addition, the Policy does not exceed existing statutory or regulatory authority to engage in mitigation processes for the purpose of making mitigation recommendations, and in limited cases, specifying mitigation requirements. The authorities and processes of different agencies may limit or provide discretion regarding the level of mitigation for a project. The Policy is not controlling upon other agencies.

The Policy provides a common framework for identifying mitigation measures. It does not create authorities for requiring mitigation measures to be implemented. The authorities for reviewing projects and providing mitigation recommendations or requirements derive from the underlying statutes and regulations. On a case-by-case basis, the Service may recommend the “no action” alternative when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available. These recommendations will be linked to avoiding impacts to high-value habitats. Also, we note that the Policy does not indicate avoidance of all high-value habitats is required. The Policy provides guidance to Service staff for making a recommendation to avoid all high-value habitats or to adopt a “no action” alternative in certain circumstances.

**Question 14:**

Given the public comment period on the general draft mitigation policy closed at the beginning of May, what is the status of the policy? How much progress has the Service made in reviewing the public comments gathered during that time?

**Response:** The Service published the final Policy on November 21, 2016. It fully considered all public comments received in developing a final Policy.

**Question 15:**

Does the Service intend to comply with the one-year deadline for publication of a final policy as required in the Presidential Memorandum on Mitigation?

**Response:** The Service did not meet the November 3 deadline; the Policy was published on November 21.

**Question 16:**

Given that the public comment period for the draft compensatory mitigation policy does not elapse until October, does the Service intend to finalize a rule before the end of the year?

**Response:** The Service intends to finalize the proposed Compensatory Mitigation Policy in December 2016 or January 2017.

**Question 17:**

Mr. Bean, I have lingering concerns about how the Department, and other agencies outside Interior's purview, will determine the concept of "durability" under the draft policies. At what level (within the Department) will the assessment of durability be made and what criteria will be used?

**Response:** The Service will recommend or require (as appropriate) that mitigation measures are durable, and at a minimum, maintain their intended purpose for as long as impacts of the action persist on the landscape. The Service will recommend or require (as appropriate) that implementation assurances, including financial and real estate, be in place when necessary to assure the development, maintenance, and long-term viability of the mitigation measure. Project review and preparation of recommendations or requirements that ensure durability will most commonly occur at the Service's Field Office level, through existing procedures for engaging project proponents and agencies.

**Question 18:**

Is the process by which the determination of the duration of an impact, or the associated mitigation, a one-time occurrence or is it an ongoing process that continues after a disturbance/mitigation activity has concluded?

**Response:** The determination of measures necessary to ensure the durability of mitigation is made at the time of project authorization and finalization of a mitigation plan. The evaluation of whether the durability of mitigation has been maintained as planned will continue. If there is any loss of durability, appropriate recommendations or follow-up actions for correcting the loss will be consistent with applicable law.

**Question 19:**

We discussed the concept of durability following the hearing in the Energy and Natural Resources Committee in March. You indicated both that the Department has the ability to assess and reassess durability during the "duration" of the impacts. Is there a point at which the relationship between the ecological situation (which may be related or unrelated to the impacts) and the disturbance requiring mitigation elapses? If so, what is the time frame; 5 years, 20 years, 50 years?

**Response:** There may be a point at which the relationship between the ecological situation and the disturbance requiring mitigation does elapse. However, the variability in the projects and associated impacts, geography, and environmental conditions are so broad, that it is not possible within a national policy to specify a time frame that is defensibly applicable in each subsequent action covered by the policy. Development of recommendations that would ensure durability of mitigation measures will occur on a case-by-case basis, as is current practice.

Senator SULLIVAN. Thank you, Mr. Bean.

I am going to start with some questions just basically on some of the topics that I mentioned in my opening statement, and the one is the issue of delay.

Do you think it is in the interest of the United States to have—it takes, on average, 6 years to permit a bridge—to get the Federal permitting requirements to permit a bridge?

Mr. BEAN. No, sir. I think delay is a genuine problem, and indeed it is a problem that our proposals are intended to address.

Senator SULLIVAN. I was going to give you a rundown of some of the delays. They're outrageous, right? Fourteen years to permit a runway; 20 years to permit a goldmine; 7 years to get permission to drill one exploration in 100 feet of water. I mean, this is the sound of the economic decline of the country, in my view.

So I am not going to run through those because you already stated that you don't disagree that that is a problem, so thank you for that.

Let me speak to what the Corps, another Federal agency, has said about your proposed regs, your proposed guidance. This is the Corps of Engineers. Knows a lot about projects, knows a lot about protecting the environment, knows a lot about, unfortunately, projects that take too long. This is their submitted comments on your proposed regulation: "Our experience is that the Fish and Wildlife staff are extraordinarily busy, to the point where handling existing requirements in a timely manner can be challenging." Just what you got right now. "Therefore, requiring Fish and Wildlife staff to take the lead," and that is what many people think you are trying to do here, take the lead, "in these types of determinations may only exacerbate the problem."

Again, this is your fellow brother-sister agency essentially saying this is going to create more delays. "We believe that it might be more efficient and effective for Fish and Wildlife staff to simply review materials for acceptability and consistency with the policy recommending any needed changes." So your traditional role.

So other Federal agencies in the Obama administration are worried that this rule is going to actually require more delays and have you guys take on too much work. What do you say in response to the Corps of Engineers, that knows a lot about these issues?

Mr. BEAN. Yes, the Corps does, and we have learned a good deal about mitigation from the Corps' own experience. Our view is that we believe, through our proposals, that we can be more efficient, more effective by being more transparent, more——

Senator SULLIVAN. So you think having another layer of Federal permitting requirements is going to make it more efficient to get projects done? The Corps of Engineers doesn't believe that. They are trying to be polite, but it is very clear that they don't believe that.

Mr. BEAN. We are not creating another layer of review.

Senator SULLIVAN. You are not?

Mr. BEAN. No, we are not.

Senator SULLIVAN. Explain how you are not creating another layer of review.

Mr. BEAN. Well, when there is an existing requirement for input from the Fish and Wildlife Service to the Corps, for example, under

its Clean Water Act authority, section 404(m), I believe it is, gives the Fish and Wildlife Service the authority, and indeed the obligation, to recommend to the Corps its views with respect to mitigation.

Senator SULLIVAN. Why do you think the Corps submitted these comments? It is pretty extraordinary, right? They obviously work with you guys closely. They don't seem to be fans of your policy. Why do you think they submitted and know that you are already having a hard time keeping up with permitting projects on a timely basis right now? They are clearly indicating that this is going to make that worse. Why do you think they submitted those comments?

Mr. BEAN. Well, our view is that this will not make that matter worse; it will make it better.

Senator SULLIVAN. OK, they disagree.

Mr. BEAN. They may disagree, but that is for them to say.

Senator SULLIVAN. So you can you commit to me that this is not going to cause any additional layer of bureaucracy and any additional delay on these critical, critical economic projects that our country needs so desperately? We are not growing our economy, and a lot of the reason is it takes forever to permit anything. Can you commit to me that that is not going to happen with this new proposed regulation?

Mr. BEAN. I believe it will not happen. I know that it is the intent to keep that from happening, and I believe it will be the case that we will be more efficient and more effective with these measures than we are today.

Senator SULLIVAN. Another issue that I have a lot of concerns about is just the legal authority to where you are going on a number of your policy calls. The first and foremost is in the President's memo, the no net loss net gain policy. That is a pretty big policy call, wouldn't you say?

Mr. BEAN. It is an important measure, but I think it has perhaps been misunderstood. I can give you an example from Senator Inhofe's State. Oklahoma and four other States together put together a range-wide conservation strategy for the lesser prairie-chicken, and that is basically a mitigation program, and as a key part of that program which functions by generating credits from activities that benefit that species, then making those credits available to offset impacts from oil and gas and other activities. What the States creatively have done is to provide that some portion of the credits generated will never be used to offset impacts, and thus, programmatically, they will achieve a net benefit, a net conservation benefit.

Senator SULLIVAN. OK, well, I am going to get back to that because that is a big policy call; it is a role for the Congress to make that call. And when I follow up, I want to be respectful to the other members here, but I don't believe that is laid out in any statute, any statute by which you get your authority, and that is a policy call that should be made by the Congress of the United States, not by a Federal agency that doesn't have that authority.

Senator Whitehouse.

Senator WHITEHOUSE. Thanks, Chairman.

Welcome, Director Bean. I appreciate you being here.

Let's pick up on the no net loss policy. That is kind of a baseline to inform your efforts. Tell us in simple terms what it means, and tell us in simple terms whether it is a novelty under this new guidance.

Mr. BEAN. It is not a novelty in general because the no net loss notion was first floated and embraced by President George H.W. Bush in 1988, who articulated that as his goal for mitigation under the Clean Water Act, and it has become established as the mitigation goal for the Clean Water Act in the ensuing 30 years. The Fish and Wildlife Service, in its 1981 policy, has a similar no net loss goal for important resources.

Senator WHITEHOUSE. That would be 35 years ago in that case.

Mr. BEAN. Yes, indeed. So it is not novel. But what is, I think, important is some of the ways in which we can accomplish that goal. I tried to give the example of lesser prairie-chicken as an illustration of how sometimes it is possible to do that relatively creatively and somewhat easily.

Senator WHITEHOUSE. The concern that Senator Sullivan has for unnecessary delays and problems and bureaucracy, I think, is a very legitimate concern, and I hope that the Service will take that to heart in the way it implements the new policy or the new guidance.

Mr. BEAN. Yes, sir. Let me just say that we were very much aware of the delays of the sort the Chairman described when we set out in this Administration to authorize various wind and solar projects on public lands in the west, and we were able to approve many of those projects relatively quickly, certainly by comparison to the statistics the Chairman gave. We did so in large measure by early coordination amongst several Federal agencies, Federal, State, and sometimes local agencies, all of whom have permitting responsibilities of one sort or another, and we found that by coordinating those efforts early on we could achieve some real efficiencies and time savings.

Senator WHITEHOUSE. For what it is worth, it is in a different context, but we deployed very coordinated permitting in our Federal waters and as a result were the first State in the country to be able to build offshore wind. We shot by both Massachusetts and Delaware and other States because we had done a good job of coordinating the permitting into a much more convenient and singular process, and the private sector folks who invested in and built the offshore wind program are huge fans of that coordinated permitting. Again, it is a different area, but I think the process savings were evident in that as well.

One other point. One of the chemical consequences of amping up the CO<sub>2</sub> levels in our atmosphere to 400 parts per million and above has been the chemical reaction of the oceans, which is to acidify. They are measurably acidifying more rapidly than any time in human history that we can find. And that will have considerable effects on ocean creatures of various kinds, whether it is the terrapod that is the base of the food chain in Senator Sullivan's side of the world or the corals that are so important to Florida's economy, or the clams and oysters that Rhode Island grows so effectively.

Are you looking at the impact of ocean acidification on species as a question worth considering under the Endangered Species Act authorities?

Mr. BEAN. Certainly, sir, it is a serious problem, apparently one that is growing in significance. We are looking at it, although I would note that the National Oceanic Atmospheric Administration has primary jurisdiction over marine creatures. The Fish and Wildlife Service has relatively limited authority over marine creatures, so it is primarily NOAA's lead on this issue. But we certainly are aware of the problem and recognize that it is a problem, and when it does affect species or other resources for which we are responsible we need to take it into account as part of our overall science-based analysis of the problem and its solutions.

Senator WHITEHOUSE. And in any event, when you are looking at a potentially multi-year plan like the prairie-chicken plan, you have to take the known facts of what is happening in that creature's environment from climate change into account as part of the scientific baseline against which you make your determinations, correct?

Mr. BEAN. Yes, we do need to do that, and the information to do that varies in quality, but where we have the information that we can rely upon we very definitely need to and do use that information.

Senator WHITEHOUSE. Thank you.

Senator SULLIVAN. Chairman Inhofe.

Senator INHOFE. Thank you.

Both Chairman Sullivan and Ranking Member Whitehouse are very well respected attorneys, and I am not a lawyer, so there might be a very simple answer to this, but your mitigation policy adopts a position that mitigation should take place in advance of project construction. Now, in section 906 of WRDA, that was the 1986 WRDA, Congress authorized the Corps to do mitigation as a project is being built; and then again in 1999, section 119 of title 23, that is the Highway Federal Code, the Federal law limits which mitigation can happen in advance of construction, even if the mitigation is voluntary.

So the question I would have is by what authority would you have this mitigation in advance?

Mr. BEAN. Well, let me begin by saying that the policy is a policy that does not purport to change statutory authority, so to the extent that there are statutory mandates or authorities that are in conflict with the policy, those prevail. What the policy articulates is where there is discretion as to the timing of mitigation, it is desirable, it is preferred to have it done in advance or contemporaneously with the impacting activities.

It has been our experience over the years that when activities that impact the environment are done first and mitigation comes later, that often leads to problems. The mitigation sometimes fails, for example; and thus there are temporal losses for which you can never fully recover. But the policy is one that is designed to influence where we have the discretion as to the timing, the choice, in favor of early mitigation activities.

Senator INHOFE. And would you say that when it is done in advance that lengthens or shortens the time for ultimate consideration?

Mr. BEAN. It actually shortens it quite considerably. A good example of that are the various mitigation banks, of which there are now over 1,000, I believe, under the Clean Water Act, these make it possible for Corps of Engineers permittees to quickly get permits and quickly fulfill their mitigation responsibilities by buying credits from established successful banks.

Senator INHOFE. All right.

Mr. Chairman, I am going to reserve some time because I need a little more time on the second panel.

Senator SULLIVAN. OK. Thank you, Mr. Chairman.

Senator Cardin.

Senator CARDIN. Well, thank you, Mr. Chairman, for calling this hearing on the update of the mitigation policies of the Fish and Wildlife.

Was 1981 the last time that we have looked at this? If my math is correct, the amount of developed acres in the lower 48 States since 1981 has increased by about 70 percent since that time, from about 70 million developed acres to about 120 million developed acres. That is a tremendous increase.

Our knowledge of climate change and the impact of climate change has changed so dramatically in the last 35 years. Our expertise on how to deal with the impact of climate change has changed very dramatically over the last 35 years.

I call to my colleagues' attention that on Tuesday we will have the ribbon cutting in Queen Anne's County, Maryland, of the living shoreline. It will be the first cobblestone and sand shingle beach project in the United States, and the Maryland Department of Natural Resources worked together with engineers to research and design this innovative shoreline stabilization project which aims to protect the beach from erosion by serving as a natural barrier to currents and tides, and increase the presence of marsh grasses that provide habitat for wildlife.

We didn't know what that was all about 35 years ago. That technology just wasn't even thought to be possible.

We have Smith Island, a habitable island in the Chesapeake Bay that I think 35 years ago they thought there was no way that we could preserve that land. Today people are still living on Smith Island, and I want to make sure they still have a place to live. And we have contributed to ways in which we can help the environment and help where people live.

So I guess my question is what is the objective here? What are we trying to do by these revisions and plans? We know that diversity of species is critically important to our environment and to our future. We know habitats have been destroyed because of climate change and development. What is the objective that Fish and Wildlife is attempting to do by these revisions?

Mr. BEAN. Thank you, Senator. The objective is to have a mitigation program that is more effective, more efficient, more predictable, and more transparent. You are correct that the 1981 policy, since that policy was promulgated, we have learned a good deal. The changes you have cited are real. I think the most important

aspect of this policy is its directive to make mitigation decisions in a landscape context, and what I mean by that is the following: in 1981 and for many years thereafter there was an almost reflexive view that mitigation should take place as close to the point of impact being mitigated as possible. Under this policy we are asking people to take a step back and look at where the mitigation can do the most good, and that is a big change because what it will mean is that we won't necessarily be tied to just mitigating at the point of impact if we can find a better place for the resource to do that mitigation. And I think that is really the most important aspect of this policy change.

Senator CARDIN. I was listening to the Chairman and his desire to try to balance our protection of the environment with the need for economic growth. You said something that I think is very, very important that we all should be able to agree on, and that is we need a transparent process and a predictable conclusion so that a developer or government knows what to expect as they try to determine whether they want to make an investment or how they are going to deal with the realities of the challenges that they have.

So I just really want to underscore that point about predictability and an open process. If I understand correctly, you are committed to the end result leading to predictable and understanding of what the requirements of mitigation are all about.

Mr. BEAN. Yes, sir, that is the objective. Again, to cite the example of the lesser prairie-chicken, the participants at that program know exactly what it will cost based upon the development activities that they are planning, the acreage they will affect, and whether that acreage is in the highest priority or the middle priority or the lowest priority habitats. They can do a quick calculation of what it will cost and decide whether they want to proceed. So it is a very predictable scheme, and it is the sort of thing that we would like to do more broadly.

Senator CARDIN. Thank you.

Thank you, Mr. Chairman.

Senator SULLIVAN. Senator Boozman.

Senator BOOZMAN. Thank you, Mr. Chairman.

And thank you for being with us today. The draft policy requires the Fish and Wildlife Service to use a valuation species for assessing required mitigation. More so, the draft policy requires the Service to identify habit values to support these evaluation species by designating them as high importance or high value. Habits of high importance are described as irreplaceable or difficult to replace.

Has the Service made everyone aware of what makes a habitat irreplaceable?

Mr. BEAN. I think the Service has tried to convey clearly what that concept means. There are certain examples, and I would give you an example from the west, peat habitats, wetland habitats that accumulate peat at a rate of about 1 foot per 1,000 years. Impacts to those habitats are, for all practical purposes in terms of our lifetimes and our grandchildren's lifetimes, irreplaceable. So that is an example of several that I would try to convey.

Senator BOOZMAN. And I appreciate the example, but have you got in writing someplace the principle of the example?



Mr. BEAN. I think so, sir. I think that the proposed policy makes clear that irreplaceable resource are those for which we either lack the means of recreating or restoring them, or the means are so time consumptive and resource consumptive as to be impractical.

Senator BOOZMAN. So how do you mitigate something that is irreplaceable?

Mr. BEAN. Well, the Fish and Wildlife Service's view is that for an irreplaceable resource, the proper response is avoidance. Now, we recognize that maybe our recommendation, but the agency to whom we make the recommendation may not take that recommendation, in which case we would then strongly urge that agency to take whatever minimization measures are practical.

Senator BOOZMAN. So once you deem something irreplaceable, it is very difficult, then, to mitigate?

Mr. BEAN. Yes, it is very difficult to mitigate, and the Service recommendation would be to avoid impacts.

Senator BOOZMAN. I think it would be good if we knew very clearly since you can't mitigate it, I think it is important that you very clearly state what is deemed irreplaceable.

Mr. BEAN. Sure. Let me emphasize one point. Mitigation is a term that encompasses a range of activities, including avoidance, minimization, and compensatory actions. So when you say something can't be mitigated, I don't want to leave the impression that you can't do things to minimize impacts to it. That, too, is a form of mitigation.

Senator BOOZMAN. Is there a possibility that irreplaceable could arbitrarily apply to other categories, such as minerals?

Mr. BEAN. Such as what, sir?

Senator BOOZMAN. Minerals.

Mr. BEAN. Not under our policy. The resources to which our policies apply are wildlife and their habitats.

Senator BOOZMAN. OK. Very good.

Thank you, Mr. Chair.

Senator SULLIVAN. Thank you, Senator Boozman.

I am going to follow up just with a few questions. I think this topic on the legal authority, which is something that we have discussed a number of times in this Committee, which is a really important issue.

So, Secretary Bean, you agree that the Fish and Wildlife Service does not have just unfettered discretion to make policy calls, right, without the regulatory, statutory authority from the Congress, correct?

Mr. BEAN. The Fish and Wildlife Service is required by law and does follow the statutory mandates applicable to it, yes, sir.

Senator SULLIVAN. So even when you cited whether it is President Obama's memo or even you cited President George H. W. Bush, the two Presidents don't have the ability to make statutory policy calls, do they?

Mr. BEAN. Only Congress does that, sir.

Senator SULLIVAN. So that is clear. Only Congress does. Whether you are citing the 2015 memo or a former President, if they are acting without statutory authority it doesn't matter what they say, correct, or what their memos say?

Mr. BEAN. It doesn't matter, although statutory authority is often granted in rather general terms, leaving them quite a bit of discretion.

Senator SULLIVAN. Correct. But let me get back to this no net loss or net gain. That is a pretty major statutory policy call, isn't it?

Mr. BEAN. It is certainly a major policy call, yes, sir.

Senator SULLIVAN. So what I would like you to do, and if you can't do it here, of the 26 statutes that you cited, I would like to know exactly where that policy is laid out, in which statute. My team has looked, and we haven't been able to find it at all, so my concern is, whether it is President Obama's 2015 memo, you are making policy, major, major policy calls that are the realm of the Congress. So right now, for example, even section 10 of the ESA, which authorizes incidental take permits, does not require a net gain or no net loss.

Again, we haven't been able to find that anywhere, so can you just tell me where? And don't give me 26 statutes. I want the statute, and I want the language in the statute that says it is the policy of the United States to have no net gain or no net loss. I mean, I am sorry, net gain or no net loss.

Mr. BEAN. What you will find in all of those statutes, I believe, just as you find in the Endangered Species Act—

Senator SULLIVAN. Endangered Species Act doesn't have it. The Migratory Bird Act doesn't even talk about mitigation.

Mr. BEAN. That is correct. But the Endangered Species Act does, and it requires, in the case of section 10 permits, that the impacts be mitigated and minimized to the maximum extent practical.

Senator SULLIVAN. Right. That is not no net gain. That is not no net loss. That is a very different. That is the standard, you are exactly correct.

Mr. BEAN. That is the statutory standard.

Senator SULLIVAN. Correct. So how do you get from there to no net loss or gain? That is a very different standard.

Mr. BEAN. If it is practicable, for example, to achieve no net loss, then that is entirely consistent with that goal.

Senator SULLIVAN. No, but you are saying that the net policy is—the President's memo says the new policy is no net loss, or indeed, net gain. And I am saying there is nowhere in any statute that we can find that lays out that policy. So you are making policy, whether it is the President or you. And you have no authority to do that. So what section of what statute gives you that—

Mr. BEAN. If you are asking, sir, do those precise words appear in the statute?

Senator SULLIVAN. Correct.

Mr. BEAN. The answer is no. Instead, what we have in all of those statutes, or nearly all of those statutes, is a directive and an authorization to mitigate.

Senator SULLIVAN. Correct.

Mr. BEAN. And the Service—

Senator SULLIVAN. I don't disagree with that. Mitigate is very different than no net loss or a net gain. It is very different. That is what I am talking about. This is a major policy call that you are usurping the authority of the Congress on this issue.

Mr. BEAN. Well, I don't think the Service views it that way, sir. I think the Service views that it has discretion authorized by Congress——

Senator SULLIVAN. It doesn't have discretion to make new policy when the policy is stated in the law.

Mr. BEAN. It has the discretion to interpret what Congress has said, and that is what it has tried to do.

I would add one other thing which is important, which is both the Service policies and the President's memo make clear that they do not override statutory restrictions.

Senator SULLIVAN. Yes, but you can say that, but in practicality that is exactly what you are doing. You are essentially admitting it here. Mitigation under the ESA is very different. The standard you are citing, which I agree with, in the ESA is very different than a standard, a policy directive of no net loss or net gain. They are apples and oranges. And you are now saying that you have this authority, when we can't find it anywhere in any statute.

Mr. BEAN. Well, let me point you to one other provision of the Endangered Species Act, section 4(d), which authorizes the Secretary to have such regulations as are necessary and advisable for the conservation of a threatened species. It is a broadly worded authorization. If the Secretary were to find, as she did in the case of the lesser prairie-chicken, that it was necessary and advisable for the conservation of that species to have a regulation that required participation in the State generated plan which itself requires a net conservation gain, that is fully consistent with the language of the statute.

Senator SULLIVAN. I would just, and maybe you can do it again, I don't want to belabor the point, but if you can give us the statutes and the language that lay out the statutory mandates on that policy, I would like to see it, because I don't think it exists.

And let me ask one other one with regard to the veto. You do have a provision in here that allows you to recommend no action. Now, it is very vague, and I don't exactly understand what you are trying to do in the new regs, but if you are trying to say somehow that you have authority to veto projects, when you are not even the lead on these projects, that again is way, way beyond your statutory authority.

What are you trying to do with that no action provision in your new policy?

Mr. BEAN. Our recommendations are just that, sir, recommendations. We have been very clear in this policy that where we have irreplaceable resources our recommendation will be to avoid impacts. That is the appropriate thing for the Fish and Wildlife Service to do in light of the responsibility that this Congress has given it, to be vigilant, if you will, in the conservation of wildlife. That is our role.

The agencies to which we make those recommendations are free to make the ultimate decision, but they need to have that decision made based upon input from us as an agency charged by law with understanding in recommending what is best for wildlife.

Senator SULLIVAN. Thank you.

Senator Whitehouse.

Senator WHITEHOUSE. Director Bean, I don't, frankly, think you need my help in this exchange, but I do want for the record to say that where the statute says that it is the goal and task conferred by Congress on the Fish and Wildlife Service to see to it that, where there is harm to wildlife or habitat, that that harm shall be mitigated to the extent practicable. That is a pretty clear statement to me, but it is also very general language.

So, to me, for the Service to then say here is a standard that we believe would meet our responsibility to mitigate the harm to the species or habitat to the extent practicable, and that is that there is no net loss; that if you are going to harm it here, and you bring back the same amount there, that meets our standard.

I think it is a question of trying to actually provide clarity to the original definition. So just from my perspective, I am completely comfortable that the no net loss standard is legitimate and clear regulatory implementation of a statute well within its terms, which is probably why Presidents since President Bush have stood by it.

So I don't mean to belabor this point any further, but at least from my point of view, I wanted to have my opinion on this in the record. So thank you.

Senator SULLIVAN. Thank you, Senator Whitehouse.

Director Bean, thank you for your testimony. Much appreciated.

I am going to ask the second panel to come up to the dais here, and I want to welcome Mr. Joshua Kindred, who is the Environmental Counsel of the Alaska Oil and Gas Association; Mr. Ryan Yates, Chairman of the National Endangered Species Act Reform Coalition; and Mr. Jamison Colburn, Professor of Law at Penn State.

You will each have 5 minutes to deliver your oral statement, and a longer written statement will be included in the record.

Gentlemen, if you can please join us now. Thank you again for coming here. Sorry again about the delays in the hearing.

Mr. Kindred, I would like to begin with you. You have 5 minutes to deliver your statement. Thanks again.

#### **STATEMENT OF JOSHUA M. KINDRED, ENVIRONMENTAL COUNSEL, ALASKA OIL AND GAS ASSOCIATION**

Mr. KINDRED. Thank you, and good afternoon, Chairman Sullivan, Ranking Member Whitehouse, and members of the Committee. My name is Josh Kindred. I serve as Environmental Counsel for the Alaska Oil and Gas Association, or AOGA. AOGA is a professional trade association whose mission is to foster long-term viability of the oil and gas industry to the benefit of all Alaskans. AOGA's members have a long history of proven environmentally responsible oil and gas exploration development in Alaska, and we appreciate the opportunity to provide testimony today.

In an effort to sort of avoid duplicative testimony, and I don't know if I will succeed in that, I will proceed directly to the substantive issues and concerns that AOGA has, and they fall effectively in three categories: first, as Senator Sullivan pointed out, an inability to reconcile achieving a net benefit, or at minimum no net loss standard with the statutory sources available for the Service; second, issues and concerns regarding ambiguity and incompati-

bility; and finally, how ill-suited the draft policy is for meaningful implementation.

Now, according to the draft policy, under the memorandum, all Federal mitigation policies shall clearly set a net benefit goal, or at minimum a no net loss goal for natural resources wherever doing so is allowed by existing statutory authority and is consistent with agency mission and established natural resources objectives. The fundamental problem with the Service's draft policy is that the primary sources of the Service's authority provide no basis for and are irreconcilable with the imposition of a net benefit or no net loss mitigation standard.

The fundamental flaw is particular evident when examined in the context of the Endangered Species Act. The ESA provides no authority for the Service to impose mitigation measures upon private applicants that will result in a net benefit or no net loss. For example, in the section 7 consultation, the Service is charged with ensuring that any federally approved action that may affect listed species is not likely to jeopardize the continued existence of a listed species or destroy or adversely modify their critical habitat.

The Service prepares a biological opinion to explain it in document section 7 determinations for actions that are not likely to jeopardize listed species or cause adverse modification of critical habitat but that may, nonetheless, result in incidental take of a listed species, and the Service will include an incidental take statement in the biological opinion.

Under these statutory and regulatory provisions, a non-jeopardizing action under ESA section 7 may have some impact on listed species and critical habitat and may result in incidental take of listed species. The Service's authority in this context is simply to recommend measures that minimize the impact of the incidental take. These measures may only result in minor changes to the project. Neither the ESA nor its implementing regulations contain any authorization for the Service to require or recommend measures in a section 7 consultation to ensure that the Federal action results in a net gain or no net loss.

Any action taken by the Service to recommend such measures would exceed the Service's statutory authority under, and therefore violate, section 7 of the Endangered Species Act.

Similarly, when the Service issues a permit under section 10 of the ESA, it must ensure that the permit applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the incidental take authorized by the permit. These statutory provisions also give no authority to the Service to impose measures that will result in a net gain or no net loss. Rather the Service must ensure that the applicant minimizes and mitigates the impact on listed species to the maximum extent practicable.

Nowhere in the draft policy does the Service grapple with the fact that the scope of its authority under section 7 and 10 of the ESA is irreconcilable with the net benefit, or at minimum no net loss standard policy adopted by the draft policy.

The draft policy explains that it is intended to clarify the role of mitigation in dangerous species conservation but also notes that nothing herein replaces, supersedes, or substitutes for the ESA's implementing regulations.

Respectfully, the Service's acknowledgments of its obligations under the ESA, while correct, do little to address the fact that the draft policy nevertheless purports to apply a standard that is fundamentally incompatible with both the ESA and its implementing regulations. The Service's competing positions that it will both apply a policy to ESA actions that is contrary to the ESA and that it will respect the authority of the ESA when implementing the draft policy cannot be rationalized.

If Congress had intended to require that every impact to listed species be completely offset, it would have written such a requirement into the ESA. If the Service or the President desires such a result, Congress must first act by amending the ESA to provide the authority to the executive branch.

The draft policy's incompatibility with statutory authority is not unique to the ESA. Indeed, we are aware of no sources of statutory authority that authorizes the Service to require a net benefit mitigation for Federal actions undertaken by citizen applicants.

For example, under section 101 of the Marine Mammal Protection Act, private citizens may obtain authorization to take small numbers of marine mammals incidental to lawful activity so long as the take has no more than a negligible impact on the affected marine mammal species or stock and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses.

The Service has no authority under the MMPA to require recipients of incidental take authorizations to take actions to achieve a net benefit or no net loss to the affected marine mammal species or stock.

Similarly, under the National Environmental Policy Act, or NEPA, agencies are required to identify appropriate mitigation measures in the discussion of alternatives and in an environmental impact statement. Such measures are not required to achieve a net benefit or no net loss. Moreover, the Supreme Court has established that NEPA provides no substantive authority to Federal agencies to require mitigation, nor does it impose a substantive duty to develop a complete mitigation plan and an EIS.

Furthermore, one unintended consequence that the Service may not have contemplated is that the draft policy's articulation of a net conservation gain mandate might result in regulatory takings. The U.S. Supreme Court has held that a regulatory taking occurs when the Government conditions approval of a land use permit on the dedication of property or money to the public unless a nexus or rough proportionality exists between the Government's requirement and the impacts of the proposed land use.

If the draft policy dictates that the Service will condition the approval of a land use permit on a net conservation gain standard, the amount of compensatory mitigation may lack the requisite nexus or rough proportionality to the impacts of the proposed land uses and thus result in a taking.

Finally, the draft ESA policy does not, but should, take into account the fact that the ESA plays a much different role in Alaska than the lower 48 States. In the last 10 years there have been ESA listings of very abundant, presently healthy, and wide ranging spe-

cies in Alaska based on protected habitat conditions at the end of the century.

For example, the Arctic green seal population numbers in the millions and occupies a range far larger than any other listed species. As another example, almost 200,000 square miles of land in offshore waters in Alaska have been designated as polar bear critical habitat.

Much of the resource development in Alaska occurs through a structured Federal process, while either Boehm or BLM in the oil and gas leasing process, that already take into account the avoidance, minimization, and mitigation of impacts to federally listed species. For example, Boehm has identified and conditioned offshore leases on related permits based in part on the presence of listed species.

In addition, almost every project in Alaska falls under the jurisdiction of the Army Corps of Engineers, which already applies stringent compensatory mitigation measures under the Clean Water Act. Accordingly, aside from being beyond the scope of authority granted by the ESA, additional action by the Service to require or recommend compensatory mitigation through the ESA would unnecessarily complicate and duplicate a Federal project approval system in Alaska that already accounts for and mitigates impacts to listed species and their habitat.

We understand that the President and the Department of Interior are motivated to broadly implement new policies to achieve net gains or no net loss of environmental values. But those policies, however well intended they may be, cannot be implemented without statutory authority. The draft policy is fundamentally flawed because it is entirely premised on achieving a standard that cannot be lawfully implemented by the Service under the Service's existing sources of statutory authority. Because of this overarching flaw, the draft policy should be withdrawn and rewritten.

Thank you.

[The prepared statement of Mr. Kindred follows:]

**“Hearing to receive testimony reviewing the proposed revisions to  
the U.S. Fish and Wildlife Service Mitigation Policy”**

**U.S. Senate Committee on Environment and Public Works  
Fisheries, Water, and Wildlife Subcommittee**

**Testimony, Joshua Kindred  
Environmental Counsel Alaska Oil and Gas Association  
September 21, 2016**

Good Afternoon Chairman Sullivan, Ranking Member Whitehouse, and members of the committee.

My name is Joshua Kindred, and I serve as Environmental Counsel for the Alaska Oil & Gas Association. AOGA is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefit of all Alaskans. AOGA’s members have a long history of prudent and environmentally responsible oil and gas exploration and development in Alaska. We appreciate the opportunity to provide testimony today.

In an effort to avoid duplicative testimony, I will proceed directly into the substantive issues and concerns regarding the USFWS proposed revisions to Mitigation Policy, which fall into three categories: (i) an inability to reconcile achieving a “net benefit or, at a minimum, no net loss” standard with the statutory sources of the Service’s authority; (ii) issues and concerns regarding ambiguity and incompatibility; and (iii) how ill-suited the Draft Policy is for meaningful implementation.

According to the Draft Policy, “[u]nder the memorandum, all Federal mitigation policies shall clearly set a net benefit goal or, at minimum, a no net loss goal, for natural resources, wherever doing so is allowed by existing statutory authority and is consistent with agency mission and established natural resource objectives.” 81 Fed. Reg. at 12,380. The fundamental problem with the Service’s Draft Policy is that the primary sources of the Service’s authority provide no bases for, and are irreconcilable with, the imposition of a “net benefit” or “no net loss” mitigation standard. In other words, several aspects of the Draft Policy are not “allowed by existing statutory authority.”

This fundamental flaw is particularly evident when examined in the context of the ESA. The ESA provides no authority for the Service to impose mitigation measures upon private applicants that will result in a net benefit or no net loss. For example, in a Section 7(a)(2) consultation, the Service is charged with ensuring that any federally approved action that may affect listed species is not likely to jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat. See 16 U.S.C. § 1536(a)(2). The Service prepares a biological opinion to explain and document its Section 7(a)(2) determinations. For actions that are not likely to jeopardize listed species or cause adverse modification of critical habitat, but that may nonetheless result in incidental take of listed species, the Service will include an incidental take



statement (“ITS”) in the biological opinion that specifies (i) the impact of the incidental taking on species, (ii) “reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,” and (iii) measures, if any, necessary to comply with the MMPA. 16 U.S.C. § 1536(b)(4). The ITS also includes “terms and conditions” to implement the measures. *Id.* Reasonable and prudent measures are “those actions the Director believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take.” 50 C.F.R. § 402.02. Additionally, “[r]easonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.” 50 C.F.R. § 402.14(i)(2).

Under these statutory and regulatory provisions, a non-jeopardizing action under ESA Section 7(a)(2) may have some impact on listed species and critical habitat, and may result in incidental take of listed species. The Service’s authority in this context is simply to recommend measures that “minimize” the impact of the incidental take. These measures may only result in “minor changes” to the project. Neither the ESA nor its implementing regulations contain any authorization for the Service to require or recommend measures in a Section 7(a)(2) consultation to ensure that the federal action results in a “net gain” or “no net loss.” Any action taken by the Service to recommend such measures would exceed the Service’s statutory authority under, and therefore violate, Section 7(a)(2) of the ESA and its implementing regulations.

Similarly, when the Service issues a permit under Section 10(a)(1)(B) of the ESA, it must ensure that the permit applicant will “to the maximum extent practicable, minimize and mitigate the impacts of” the incidental take authorized by the permit. 16 U.S.C. § 1539(a)(2)(B). These statutory provisions also give no authority to the Service to impose measures that will result in a “net gain” or “no net loss.” Rather, the Service must ensure that the applicant minimizes and mitigates the impact on listed species “to the maximum extent practicable.” *Id.* Nowhere in the Draft Policy does the Service grapple with the fact that the scope of its authority under Sections 7(a)(2) and 10(a)(1)(B) of the ESA is irreconcilable with the “net benefit or, at a minimum, no net loss” standard adopted by the Draft Policy.

The Draft Policy explains that it is intended to “clarify the role of mitigation in endangered species conservation” but notes that “nothing herein replaces, supersedes or substitutes for the ESA implementing regulations.” 81 Fed. Reg. at 12,396. Respectfully, the Service’s acknowledgment of its obligations under the ESA, while correct, does little to address the fact that the Draft Policy nevertheless purports to apply a standard (net gain or no net loss) that is fundamentally incompatible with both the ESA and its implementing regulations. The Service’s competing positions that it will both apply a policy to ESA actions that is contrary to the ESA and that it will respect the authority of the ESA when implementing the Draft Policy cannot be rationalized. If Congress had intended to require that every impact to listed species be completely offset (or result in a net gain), it would have written such a requirement into the ESA. If the Service or the President desires such a result, Congress must first act by amending the ESA to provide that authority to the Executive Branch.

To amplify the problems described above, the Draft Policy requires the Service to use “evaluation species” as the touchstone for assessing required mitigation, and, under the Draft

Policy, ESA-listed species always qualify as “evaluation species.” See 81 Fed. Reg. at 12,388. The Draft Policy further requires the Service to identify habitat values to support evaluation species and encourages the Service to assess those values in advance at the landscape level, designating certain habitats as “high importance” or “high value.” “For all habitats, the Service will apply appropriate and practicable measures to avoid and minimize impacts over time, generally in that order, before applying compensation as mitigation for remaining impacts. For habitats we determine to be of high value, however, the Service will seek avoidance of all impacts.” 81 Fed. Reg. at 12,389 (emphases added). The Draft Policy indicates that designated critical habitat for ESA-listed species is “high value.” See, e.g., id. at 12,394 (“Habitats of high importance are irreplaceable or difficult to replace, or are critical to evaluation species by virtue of their role in achieving conservation objectives within the landscape.”).

Under the ESA, some impacts to habitat are permitted and need not be entirely “avoided” or completely offset by mitigation. In a Section 7(a)(2) consultation, the Service is required to determine whether an action will cause “a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.” Id. (emphasis added). An action that causes habitat impacts below this standard will result in an a “no adverse modification” conclusion, and the Service will include reasonable and prudent measures in the biological opinion that cause only “minor changes” to the action and that “cannot alter the basic design, location, scope, duration, or timing of the action.” 50 C.F.R. § 402.14(i)(2). In contrast, the Draft Policy would require the Service to seek “avoidance” of all impacts to critical “high value” habitat and, assuming the policy allowed for any such impacts to “high value” habitat, it would require the Service to mitigate for those impacts to achieve a “net gain” or “at a minimum, no net loss.” Again, the Draft Policy is fundamentally contrary to the well-established requirements of the ESA. The Service has no authority to mandate the complete avoidance of designated critical habitat or to require that all impacts to critical habitat be offset with mitigation measures that achieve a net gain or no net loss.

The Draft Policy’s incompatibility with statutory authority is not unique to the ESA. Indeed, we are aware of no sources of statutory authority that authorize the Service to require “net benefit” mitigation for federal actions undertaken by citizen applicants. For example, under Sections 101(a)(5)(A) and (D) of the MMPA, private citizens may obtain authorization to take “small numbers” of marine mammals incidental to lawful activity so long as the take has no more than a “negligible impact” on the affected marine mammal species or stock and will not have “an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses.” 16 U.S.C. § 1371(a)(5)(A) and (D). The Service may require mitigation and monitoring measures to achieve “the least practicable adverse impact” on the species or stock. Id. (emphasis added). However, the Service has no authority under the MMPA to require recipients of incidental take authorizations to take actions to achieve a “net benefit” or “no net loss” to the affected marine mammal species or stock.

Similarly, under the National Environmental Policy Act (“NEPA”), agencies are required to identify “appropriate” mitigation measures in the discussion of alternatives in an environmental impact statement (“EIS”). See 40 C.F.R. § 1502.14(f); 42 USC § 4332. Such measures are not

required to achieve a “net benefit” or “no net loss.” Moreover, the Supreme Court has established that NEPA provides no substantive authority to federal agencies to require mitigation nor does it impose a substantive duty to develop a complete mitigation plan in an EIS. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-53 (1989).

Furthermore, one unintended consequence that the Service may not have contemplated is that the Draft Policy’s articulation of a “net conservation gain” mandate might result in regulatory takings. The U.S. Supreme Court has held that a regulatory taking occurs when the government conditions approval of a land use permit on the dedication of property or money to the public unless a “nexus” and “rough proportionality” exists between the government’s requirements and the impacts of the proposed land use. If the Draft Policy dictates that the Service will condition the approval of a land use permit on a “net conservation gain” standard, the amount of compensatory mitigation may lack the requisite “nexus” and “rough proportionality” to the impacts of the proposed land use, and, thus, result in a “taking”.

In addition, the Draft ESA Policy does not, but should, take into account the fact that the ESA plays a much different role in Alaska than in the Lower 48 states. In the last 10 years, there have been ESA listings of very abundant, presently healthy, and wide-ranging species in Alaska (and offshore Alaska) based on projected habitat conditions at the end of the century. For example, the Arctic ringed seal population numbers in the millions and occupies a range far larger than any other listed species. As another example, almost 200,000 square miles of land and offshore waters in Alaska has been designated as polar bear critical habitat. Much of the resource development in Alaska occurs through structured federal processes -- such as the BOEM (offshore) and BLM (onshore) oil and gas leasing processes -- that already take into account the avoidance, minimization, and mitigation of impacts to federally listed species. For example, BOEM has identified and conditioned offshore leases or related permits based, in part, on the presence of listed species. In addition, almost every project in Alaska falls under the jurisdiction of the Army Corps of Engineers, which already applies stringent compensatory mitigation measures under the Clean Water Act. Accordingly, aside from being beyond the scope of authority granted by the ESA, additional action by the Service to require or recommend compensatory mitigation through the ESA would unnecessarily complicate and duplicate a federal project approval system in Alaska that already accounts for, and mitigates, impacts to listed species and their habitat.

We understand that the President and the Department of Interior are motivated to broadly implement new policies to achieve net gains or no net loss of environmental values. But, those policies, however well-intended they may be, cannot be implemented without statutory authority. The Draft Policy is fundamentally flawed because it is entirely premised on achieving a standard that cannot be lawfully implemented by the Service under the Service’s existing sources of statutory authority. Because of this overarching flaw, the Draft Policy must be withdrawn and rewritten.

Senator SULLIVAN. Thank you, Mr. Kindred.  
Mr. Yates.

**STATEMENT OF RYAN YATES, CHAIRMAN, NATIONAL  
ENDANGERED SPECIES ACT REFORM COALITION**

Mr. YATES. Chairman Sullivan, Ranking Member Whitehouse, members of the Subcommittee, my name is Ryan Yates. I currently serve as Chairman of the National Endangered Species Act Reform Coalition, also known as NESARC. I am pleased to provide testimony today on the Fish and Wildlife Service proposed revisions to its mitigation policy.

NESARC is the country's oldest broad-based national coalition dedicated solely to achieving improvements to the Endangered Species Act and its implementation. NESARC's members represent a broad section of the American economy, which include agriculture, energy, real estate, forestry, water development, local governments, and other important industries. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA.

The business concerns and activities of NESARC's members frequently require them to seek approval from Federal agencies for permitting and authorization decisions. Our members seek clear and consistent standards that are within the scope of the law and that will guide the implementation of mitigation for a particular permit or authorization.

NESARC's primary concern with the proposed mitigation policy and the Administration's other recent policies addressing mitigation is that they exceed the scope of applicable statutory authority. While the Service proposed the mitigation policy in response to directives from the President and the Secretary of the Interior, these policies cannot supplant, expand, and allow deviations from the Service's existing authorities and responsibilities and obligations. These responsibilities and obligations are grants from Congress and cannot be created by executive action.

The ESA establishes specific standards and requirements for the scope and nature of any avoidance, minimization, and mitigation measures that may be imposed by the Service. Further, the ESA requires specific analysis and evaluation of impacts to listed species and designated critical habitat. The mitigation policy would impermissibly expand the scope of the ESA to rely upon landscape scale approaches, net conservation gains, and evaluation of species in a manner that is inconsistent with the requirements of ESA section 7 and section 10. These statutory requirements cannot be overridden or undermined by the application of a general agency policy.

The central goal of the mitigation policy is to effectuate a net conservation gain, or at minimum no net loss in the status of affected resources. Under the ESA, there is no mandatory obligation to improve or maintain the current status of affected resources. On the contrary, the statute provides specific standards in section 7 and section 10 regarding what may be required of a project proponent or a permit applicant.

For example, the ESA section 7 requirements to avoid jeopardy or adverse modification and to minimize the impact of any take of listed species do not equate to the net conservation gain or no net

loss standard articulated in the mitigation policy. There is no statutory authority to impose such requirements in the section 7 consultation context.

A further problem posed by the Service's approach is that the term "conservation gain" is not easily defined and will likely evade consistent application in practice. Further complicating matters, if the Service uses this standard to require mitigation that is not commensurate with impacts to species or habitat the agency's application of a net conservation gain requirement could result in a regulatory taking.

Last, the Service's landscape scale approach is overly expansive and fails to consider the role of States and local jurisdictions in species conservation. The Service cannot incorporate landscape scale mitigation into permitting decisions or authorizations without explicit statutory authority which requires such a broad ecological approach. For example, the Service cannot convert its limited scope of authority under section 7 and section 10, which focus on the impact of take of the species in a particular area, to an authorization to expand the minimization component to a landscape scale.

Further, the agency's new definition of landscape and its reliance on a landscape scale approach are not conducive to consistent application and would undermine the role of States and other local jurisdictions in the management of species and habitat.

While NESARC recognizes that mitigation is a tool which can be required in the application and approval of certain Federal permits, the proposed mitigation policy is overly broad, lacks the requisite statutory authority for implementation. Unless revised and clarified, the mitigation policy will introduce uncertainty into project planning, impose significant additional costs, and delay or prevent the issuance of necessary permits and authorizations, and ultimately reduce incentives for participation in efforts that would conserve species and their habitat.

Senator, thank you again for the opportunity to testify. I am happy to answer any questions you may have.

[The prepared statement of Mr. Yates follows:]

**Testimony of**

**Ryan Yates, Chairman of the National Endangered Species Act Reform Coalition**

*before*

**The Senate Committee on Environment and Public Works  
Subcommittee on Fisheries, Water, and Wildlife**

*on*

**Reviewing the Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy**

**September 21, 2016**

Chairman Sullivan, Ranking Member Whitehouse, and Members of the Subcommittee:

My Name is Ryan Yates. I currently serve as Chairman of the National Endangered Species Act Reform Coalition, also known as NESARC, and I am pleased to provide testimony today on the United States Fish and Wildlife Service's ("FWS") proposed revisions to its Mitigation Policy.

NESARC is the country's oldest broad-based, national coalition dedicated solely to achieving improvements to the Endangered Species Act ("ESA") and its implementation. NESARC's membership includes agricultural interests, cities and counties, commercial real estate developers, conservationists, electric utilities, energy producers, farmers, forest product companies, home builders, landowners, oil and gas companies, ranchers, water and irrigation districts, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

**Summary of Concerns**

The business concerns and activities of NESARC's members frequently require them to seek approval from federal agencies for permitting and authorization decisions. A necessary element of these federal permitting and authorization decisions is the review, under the applicable statute, of potential avoidance and minimization measures that may be required to reduce the effects of a proposed project on environmental resources. NESARC's members invest a significant amount of time and resources in designing and implementing projects, and use a variety of avoidance, minimization, and compensatory mitigation tools to address adverse environmental effects. Our members seek clear and consistent standards that are within the scope of the applicable governing law and that will guide the implementation of mitigation for a particular permit or authorization.

NESARC's primary concern with the proposed revisions to the Mitigation Policy, and the Administration's other recent policies addressing mitigation, is that they test the boundaries of agency authority and likely exceed the scope of the applicable statutory framework without offering clear and transparent guidance to the regulated community. Federal agencies cannot, by fiat,

attempt to impose a net conservation gain as an absolute mitigation requirement, absent a clear grant of such authority from Congress. In addition to the lack of authority to impose a net conservation gain standard, FWS should not implement policies that discourage innovation and are inflexible in application. For a discussion of additional concerns, I request the inclusion of the complete set of comments that NESARC submitted to FWS with respect to the Mitigation Policy in the hearing record.

Compounding the issues regarding implementation of the Mitigation Policy, FWS has recently published its draft ESA Compensatory Mitigation Policy (“CMP”). The CMP contains many of the same issues and deficiencies that are inherent in the general Mitigation Policy. NESARC is still reviewing the proposed CMP in order to submit comments and is awaiting FWS’s response to our request for an extension of the comment period.

#### **Lack of Statutory Authority for Implementation of the Mitigation Policy**

The Mitigation Policy assumes a level of FWS authority that is inconsistent with the statutes that invest authority in the agency. While FWS proposed the Mitigation Policy in response to directives from the President and the Secretary of the Interior, these policies cannot supplant, expand, or allow deviations from FWS’s existing statutory responsibilities and obligations; these responsibilities and obligations are grants from Congress and cannot be created by executive action. Before implementation, FWS must provide additional, specific guidance on how the Mitigation Policy will be applied within the various statutory frameworks that are referenced in the policy and must clarify the interplay between the authorizations given to FWS under a particular statute and the application of the Mitigation Policy. FWS also must recognize that the imposition of any mitigation measures under the Mitigation Policy is constrained by, and cannot exceed, the scope of authority provided by an applicable statute.

Particularly problematic is FWS’s proposal to abandon present policies and apply the Mitigation Policy to actions undertaken pursuant to the ESA. The ESA establishes specific standards and requirements for the scope and nature of any avoidance, minimization and mitigation measures that may be imposed by FWS. Further, the ESA requires specific analysis and evaluation of impacts to listed species and designated critical habitat. The Mitigation Policy would impermissibly expand the scope of the ESA to rely upon landscape-scale approaches, net conservation gains, and evaluation of species in a manner that is inconsistent with the requirements of ESA Section 7 and Section 10. These statutory requirements cannot be overridden or undermined by the application of a general FWS Mitigation Policy.

The Mitigation Policy also fails to explain the statutory basis or provide guidance on implementation of certain elements. For example, the Mitigation Policy fails to recognize that FWS cannot recommend or require “no action” or the “avoidance of all impacts” unless it has the specific statutory authority to do so. Further, FWS fails to identify the statutory mechanisms or procedures that are to be used to coordinate with other Federal agencies and seek implementation of the Mitigation Policy.

#### **No Basis for the Imposition of a “Net Conservation Gain” Standard**

The central goal of the Mitigation Policy is to effectuate a “net conservation gain” (or, at a minimum, no net loss) in the status of affected resources. However, the Mitigation Policy fails to

provide the basis and authority for imposing a net conservation gain requirement and needs additional clarification on how the implementation of such a requirement would occur in practice.

Under the ESA, there is no mandatory obligation to improve or maintain the current status of affected resources. On the contrary, the statute provides specific standards in Sections 7 and 10 regarding what may be required of a project proponent. Under ESA Section 7, FWS must evaluate whether a federal action is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. Jeopardy occurs when an action would “reduce appreciably the likelihood of both the survival and recovery of a listed species,” and adverse modification occurs when an action would “appreciably diminish the value of critical habitat for the conservation of a listed species.” Further, if take of a listed species will occur, FWS will provide an incidental take statement and the reasonable and prudent measures considered “necessary or appropriate to minimize such impact.” The ESA requirements to avoid jeopardy or adverse modification and to minimize the impact of any take of listed species do not equate to the “no net loss” or “net conservation gain” standards articulated in the Mitigation Policy, and there is no statutory authority to impose such requirements in the Section 7 consultation context.

Similarly, under ESA Section 10, an applicant for an incidental take permit must submit a habitat conservation plan (“HCP”) that addresses several criteria, including the impacts resulting from the take of the species and the steps that will be taken to minimize and mitigate such impacts. FWS will issue the permit if it finds, in part, that the applicant “will, to the maximum extent practicable, minimize and mitigate the impacts of such taking,” and the survival and recovery of the species will not be appreciably reduced. In its longstanding interpretation of these criteria, FWS stated that neither the ESA nor its implementing regulations require that an HCP result in a “net benefit to affected species.” Thus, as FWS has recognized, Section 10 does not provide authority to require applicants to achieve a net conservation gain.

A further problem posed by FWS’s approach is that not only is there a lack of statutory authority, but also, the term “conservation gain” is not easily defined. In practice, this concept of a “conservation gain” is likely to evade consistent application and will have additional consequences that have not been fully considered. For example, in some cases, FWS may be able to quantify the specific extent of an impact (e.g., acres of wetlands or number of species taken) and thereby calculate a corresponding amount of mitigation. But FWS is absolutely silent as to whether net conservation gain is to be solely measured on a numerical basis or whether FWS intends to undertake a qualitative judgement as to the level of mitigation that actually achieves this ephemeral standard. In many other circumstances, it will not be possible for FWS to make such definitive calculations (e.g., multiple species, varied habitat features, etc.), which will then undermine the ability to assess any mitigation obligation with specificity. Further complicating matters, if FWS uses a net conservation gain approach to require mitigation that is not commensurate with the impacts to species or habitat, FWS’s application of a “net conservation gain” standard could result in a regulatory taking.

#### **The Landscape-Scale Approach is Overly Expansive and Fails to Consider the Role of States and Local Jurisdictions in Species Conservation**

A central component of the Mitigation Policy is the adoption of a “landscape approach” that attempts to place all FWS decisions—including species-specific actions under the ESA—into a decision framework that emphasizes analysis under a broader ecological, or “landscape-scale”



context. However, FWS cannot incorporate landscape-scale mitigation into permitting decisions or authorizations without explicit statutory authority that requires such a broad ecological approach. Further, FWS's definition of landscape and its reliance on a landscape-scale approach are not conducive to consistent application and would undermine the role of States and other local jurisdictions in the management of species and habitat.

FWS fails to recognize that the use of a landscape approach is often precluded by a more limited scope of impact analysis required by the underlying statute for which the analysis is being undertaken. For example, when there will be incidental take pursuant to an action analyzed in ESA Section 7 consultation, FWS is required to develop reasonable and prudent measures that will "minimize such impact." Similarly, for an incidental take permit under ESA Section 10, the applicant must "minimize and mitigate the impacts of such taking" to the maximum extent practicable. FWS cannot convert this limited scope of authority, which is focused on the impact of take of the species in a particular area, to an authorization to expand the minimization component to a landscape scale. Likewise, developing minimization measures for a particular action does not equate to an obligation to prevent fragmented landscapes or to restore core areas and connectivity for species.

If FWS retains the proposed landscape-scale approach in its Mitigation Policy, it must be refined through more specific criteria and guidance on its implementation. As proposed, FWS' approach could be construed to incorporate an infinite number of factors that may be incapable of resolution under FWS's limited authorities. Instead, the Mitigation Policy must be limited to application in those instances where there is a nexus between the geographic area that may be impacted by a proposed project, the area where mitigation may be appropriate, and the scope of the landscape that FWS will consider based on additional ecosystem stressors. In particular, FWS cannot rely upon a "landscape approach" to attempt to address climate-related impacts which often cannot be reduced to analysis at a local or project-level scale. FWS should also ensure that mitigation requirements achieve an efficient result—in terms of timing, benefits and costs incurred—and the proponent of an activity with a small permanent footprint and/or temporary effects should not be burdened by escalating mitigation measures based upon other activities or effects within a landscape.

Finally, any application of a landscape approach must consider the role of States, counties and other government entities in managing fish and wildlife resources and their habitats, and the associated costs and benefits of imposing mitigation requirements in particular circumstances. Given the need for, and documented success of, local conservation efforts in conserving species and habitats, FWS should ensure that these efforts are considered and not undermined through the application of a larger-scale mitigation analysis.

#### **The Mitigation Policy Must Provide for Flexibility and Innovation to Encourage Conservation Efforts**

Assuming that FWS demonstrates the requisite statutory authority, to be successful, the Mitigation Policy must provide incentives and reduce the barriers for landowner participation. FWS must recognize voluntary conservation planning efforts that are associated with a particular species, habitat, or activity and allow such efforts to be applied as mitigation under the Mitigation Policy. In addition, FWS must emphasize the incorporation of streamlined permitting reviews, the reduction of excessive federal bureaucracy, and the flexibility to allow new approaches to mitigation.

The Mitigation Policy currently requires that compensatory mitigation be implemented before there are impacts associated with a particular project. This requirement for advance compensatory mitigation is unrealistic and incompatible with the process by which project permitting and financing determinations are made. Depending upon the species or habitat, compensatory mitigation may not be available at the time impacts from a project occur. In such cases, FWS should not deny regulatory approval for, or delay the initiation of, projects that impact that species. As a related issue, in most instances, funding for compensatory mitigation is not available and will not be advanced until after a permitting decision is complete and other project milestones have been achieved. FWS must recognize that strict adherence to advance mitigation requirements can have negative implications on the ability to secure necessary funding for a project to proceed towards implementation.

The Mitigation Policy also states that compensatory mitigation must be in addition to any existing or foreseeably expected conservation efforts planned for the future. This restriction will have a chilling effect on any voluntary efforts that a party may be willing to undertake. For example, during the development phase of a project, a landowner or project proponent may modify the scope or location of the contemplated activity to avoid or minimize impacts to species or habitats. In other circumstances, parties often will undertake conservation efforts with the expectation that other future activities may require offsetting mitigation (e.g., a county initiating a long-term planning process to improve water quality before a specific project within the watershed is developed). FWS must take these proactive measures into consideration when assessing any mitigation associated with the activity under review. Otherwise, FWS will create a strong disincentive for parties to incorporate avoidance and minimization strategies into the design of their actions and will undermine efforts to promote the long-term conservation of species and habitats.

#### **Conclusion**

While NESARC recognizes that mitigation is a tool which can be required in the application and approval of certain federal permits, the proposed FWS Mitigation Policy is overly broad and lacks the requisite statutory authority for implementation. Unless revised and clarified, the Mitigation Policy will introduce uncertainty into project planning, impose significant additional costs, delay or prevent the issuance of necessary permits and authorizations, and reduce incentives for participation in efforts that would conserve species and their habitat. FWS must reevaluate its approach to the imposition of mitigation requirements to ensure that it is consistent with applicable law and encourages cost-effective solutions, where necessary, that promote stakeholder participation.

Thank you again for the opportunity to testify. I am happy to answer any questions you might have.

Senator SULLIVAN. Great. Thank you very much, Mr. Yates.  
Professor Colburn.

**STATEMENT OF JAMISON COLBURN, PROFESSOR OF LAW,  
PENN STATE UNIVERSITY**

Mr. COLBURN. I would like to thank Chairman Sullivan and Ranking Member Whitehouse, as well as the rest of the Committee, for the opportunity to testify today. It is an honor and a privilege to be here with you.

My name is Jamie Colburn. I am a Professor of Law at Penn State. For the last 15 years I have conducted research on policies like this one and their importance and significance in our legal system.

Before I left practice I went into teaching full-time. I spent 2 years as assistant regional counsel for U.S. EPA, and I am here today to talk about the breadth of this policy and the challenge created by the many different statutory authorities the Fish and Wildlife Service has to discharge.

I want to highlight a couple general points before I delve into specifics.

First, I think it is important to point out that this is guidance to subordinate agency personnel; it is not binding on anybody outside of the agency. Certainly not binding on the Federal courts, and it is immediately repealable by executive action if a subsequent Presidential administration would choose to do so.

I think in citing 11 different Federal statutes at the outset of the policy proposal, the agency tipped its hand, so to speak, about the scope of its challenge. The Fish and Wildlife Service is often called upon to enforce a very specific statutory standard, which is the case with Endangered Species Act section 10, maximum extent practicable determinations, but they are also called upon in many contexts to offer recommendations that really don't have any force or effect at all; they are just the recommendation of an expert agency.

And in the 15 years that I have been working on Endangered Species Act NEPA issues I have seen the scope of this practice of mitigation expand to an extreme degree, and it is my belief that what the agency was trying to do in offering a policy to its subordinates is to bring some coherent predictability and some transparency to mitigation at a broader scale. And if I may, I would just like to focus on a couple of specifics both from the Endangered Species Act and the NEPA context.

When the agency is offering a specific interpretation of a statutory standard, as, for example, with the Endangered Species Act, it is often in everybody's best interest, certainly with something as complicated as mitigation for purposes of a habitat conservation plan, that agency personnel know all of the factors that they have to balance and only the factors that they have to balance. And I say that it is in everybody's best interest because of how litigious many of these issues have become.

If agency personnel have to reinvent the wheel every time they make a necessarily discretionary judgment like this, it is going to compound the delay; it is going to reduce the transparency of those determinations to permittees in particular. And that is just the

case with respect to HCP and other determinations that the Service has to make. This compounds itself through section 7 consultations as well.

A policy of this kind, though, which treats mitigation in full, isn't just aiming at the Fish and Wildlife Service's specific duties to interpret statutory standards and enforce them against individual parties; it also encompasses more passive actions that the Fish and Wildlife Service takes as a recommender of good practices. And that brings me to what mitigation means in the NEPA context.

NEPA section 102(2)(C) specifically requires action agencies that are preparing its detailed statements to seek the input—really the expertise—of any agency with Federal jurisdiction involved with the action, that might be germane to the action; and Fish and Wildlife Service, having the broad remit that it does, almost more often than any other agency finds itself called upon to offer its recommendations with regard to fish, wildlife, and plant resources.

And in that context this is an entirely passive act by the Fish and Wildlife Service. They don't have any regulatory authority at all; what they are attempting to do is offer an expert opinion. But it has a lot of consequences for the action agency and oftentimes for the permittee behind that action agency if the Fish and Wildlife Service doesn't understand the scope, the Fish and Wildlife Service personnel involved in that case don't understand the scope of what mitigation should or ought to entail according to broader agency priorities.

And as I lay out in my written testimony, this is a threshold problem both for whether or not to prepare a detailed statement under section 102(2)(C) of NEPA, but it is also a problem that arises a little bit further down the road when agencies are preparing what are known as Findings Of No Significant Impact, or FONSI—environmental lawyers love acronyms—and the FONSI itself is predicated on the permittee or the action agency taking some kind of mitigating action.

These mitigated FONSI have grown in prevalence, and they have also grown in importance, which means that they often wind up in Federal court. They often become the subject of Federal court scrutiny. A policy of this kind, which communicates to other action agencies like the Corps of Engineers, as the Chairman was referencing, and their permittees what the Fish and Wildlife Service's priorities will be when it comes to a mitigation opinion under a section 102(2)(C) detailed statement or a mitigation opinion in the mitigated FONSI context I think would have the potential actually to speed permitting processes along. And I think that is why you see Federal courts encouraging agencies to maintain policies like this.

In my view you have gotten clear signals from our Supreme Court last year, in the *Perez* case, and from the D.C. Circuit in a variety of cases, where they want to interpret the Administrative Procedure Act really to encourage these kinds of policies in order to increase the transparency and in order to ensure that subordinate agency personnel are responding to broader priorities that the agency has and that the Administration has, and that everybody knows how they will be doing so ahead of time. I think that is

something that you can find from a number of lower Federal court opinions as well as from the Supreme Court.

I see my time is about up, and I welcome any questions you may have. Thank you again.

[The prepared statement of Mr. Colburn follows:]

WRITTEN TESTIMONY OF:  
Jamison E. Colburn  
Professor of Law &  
Joseph H. Goldstein Faculty Scholar  
Penn State University  
University Park, PA

BEFORE THE UNITED STATES SENATE  
COMMITTEE ON ENVIRONMENT AND  
PUBLIC WORKS

HEARING: "Reviewing the Proposed Revisions  
To the U.S. Fish and Wildlife Service Mitigation Policy"

September 21, 2016

**Key Points:**

- Mitigation of impacts to its "trust resources" is a multifaceted mission for the Fish & Wildlife Service involving both its direct enforcement of statutory standards and its broader advice-giving roles;
- The Fish & Wildlife Service's policy goal is to provide a coherent framework within which agency discretion across a broad range of statutory authorities and programs should be exercised;
- Two key program areas, the Endangered Species Act and National Environmental Policy Act, have both seen the prevalence and relevance of "mitigation" increase significantly since 1981;
- Courts have generally supported agency efforts to adopt unifying policies that structure and justify exercises of agency discretion that would otherwise remain ad hoc.

I would like to thank Chairman Sullivan, Ranking Member Whitehouse and the rest of the Fisheries, Water and Wildlife Subcommittee for the opportunity to testify at this hearing on the U.S. Fish and Wildlife Service's proposed mitigation policy update. It is an honor and privilege to be with you today. My name is Jamie Colburn and I am a Professor of Law at Penn State University. I have been conducting research on policies like this one and their impacts and significance in the legal system

for about 15 years. Before I left practice and went into teaching full time I served as Assistant Regional Counsel at the United States Environmental Protection Agency from 1998 to 2000. I am the author of more than a dozen articles, book chapters, and monographs on the Endangered Species Act and the National Environmental Policy Act, two statutes where "mitigation" has become extremely important.

I would like to highlight a few general points about the policy before I delve into specifics. First, this policy is a guidance issued to subordinate personnel in the U.S. Fish and Wildlife Service ("FWS"). It does not have the force of law and U.S. federal courts are not bound by it. Second, the policy can be disabled immediately by any subsequent executive branch action should FWS and/or U.S. Department of Interior leadership so choose. Finally, in citing eleven (11) different federal statutes that supply FWS, through delegation by the Secretary of the Interior, "specific authority for conservation of [fish, wildlife, plants, and their habitats] and that give [FWS] a role in mitigation planning for actions affecting them," 81 Fed. Reg. at 12383, the agency is obviously aiming to bring a coherent and consistent approach to an otherwise diverse array of actions and deliberations. Policies of this kind inevitably involve administrative discretion that subordinates must deploy

otherwise on an ad hoc basis. A single guidance of this kind that informs all actions, service-wide, resolving the agency's advice on mitigation and approach to mandatory mitigation can bring a level of transparency and predictability to agency operations that would otherwise be lacking.

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FWS already has a policy on "mitigation" recommendations and requirements, dating from 1981. See U.S. Fish & Wildlife Serv., Proposed Revisions to the U.S. Fish & Wildlife Serv. Mitigation Policy, 81 Fed. Reg. 12380, 12381 (2016). A principal reason to update such a policy is how much the science of fish, wildlife and plant conservation has improved in the last 35 years. Indeed, FWS notes that its 1981 policy was largely structured around the 1978 Council on Environmental Quality rules implementing National Environmental Policy Act § 102(2) and those rules' definition of "mitigation." See *id.*

Because "mitigation" of impacts and threats to "trust resources," which FWS defines as "migratory birds, federally listed endangered and threatened species, certain marine mammals, and interjurisdictional fish," 81 Fed. Reg. at 12383, is broad in scope, the proposed update provides for a range of applications and goals. Consistently throughout, however, the Service carefully notes that its policy is to "recommend or



require" actions as appropriate. In some contexts, FWS is asked for its *recommendations*, as is often the case with, for example, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667e, where FWS recommendations to action agencies developing water-related projects are to give FWS recommendations full and equal consideration with other project purposes. In other contexts, FWS is tasked with the enforcement of statutory standards, as is the case with Endangered Species Act § 7(a)(2) consultations involving action agencies considering actions that may jeopardize the continued existence or adversely modify the designated critical habitat of listed taxa. See 16 U.S.C. 1536(a)(2).

A policy organizing the considerations germane to all efforts to "mitigate" unavoidable impacts on fish, wildlife, plants and their habitats necessarily ranges across FWS deliberations that end in both "recommended" and mandatory mitigation. This does not mean the policy adds any greater force to FWS's conclusions in those (future) contexts reached by this policy. The proposal simply tenders a unified approach to reaching those conclusions and does so entirely in keeping with the Office of Management & Budget's "good guidance" guidelines on the development of policies like this. See Office of

Management and Budget, Final Bulletin for Agency Good Guidance Practices (Bulletin No. 07-02), 72 Fed. Reg. 3432 (2007).

The Supreme Court has made clear that policy changes of this kind need not entail the Administrative Procedure Act's "notice and comment" rulemaking procedure merely for being a change in a long-standing interpretation(s) of law. See Perez v. Mortgage Bankers' Ass'n., 135 S. Ct. 1199 (2015). Indeed, the use of the publication process that FWS has undertaken for its mitigation policy update is to be encouraged, according to OMB's bulletin, in order to "channel the discretion of agency employees" and "enhance fairness" to the public by being more transparent about agency expectations in these discretionary contexts. See Final Bulletin, 72 Fed. Reg. at 3432.

Policies like FWS's mitigation proposal fill gaps that exist as the necessary result of our administrative state. They are readily revised by subsequent presidential administrations, but this hardly diminishes their utility to the agencies that maintain them. See Elena Kagan, *Presidential Administration*, 114 **Harv. L. Rev.** 2245, 2331-46 (2001). In effect, the use of transparent, publicly-adopted policies to guide administrative discretion enhances the agency's predictability to others, highlights important exercises of discretion to all subsequent

presidential administrations, and orients agency personnel to a consistent baseline.

Any policy of this kind inevitably touches the legal authority(s) on which the agency acts. The FWS proposal on mitigation is no exception, listing almost a dozen federal statutes necessitating FWS decisions about mitigation, either as a "recommendation" to others or as an interpretation of law. See 81 Fed. Reg. at 12383. I will consider two of the statutes invoked by way of example: the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA).

In ESA contexts, FWS is often called upon to recommend or to find that various mitigation measures fulfill applicable statutory requirements. For example, before FWS may permit the "taking" of listed taxa pursuant to ESA § 10(a)(1), 16 U.S.C. § 1539(a)(1), it must find that its permit applicant will take steps to "minimize and mitigate" any "impacts" resulting from the taking. *Id.* at § 1539(a)(2)(B)(ii). This is to be a public process, *see id.* at § 1539(c), and knowing the applicable policies FWS personnel ought to abide by in advance of any conclusions of law or findings of fact being published empowers permittees and other interested persons to participate in the issuance of ESA § 10 permits.

Likewise, FWS often consults with any federal agency whose actions may jeopardize the continued existence or adversely modify designated critical habitat of a listed taxon pursuant to ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2). Consultation where "take" may be involved often turn to FWS's specifying "those reasonable and prudent measures that . . . [are] necessary or appropriate to minimize" impact on the taxon. *Id.* at § 1536(b)(4).

In these contexts, it can be critical to focus agency personnel on all of those factors and *only* those factors called for by the applicable statute. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). The Administrative Procedure Act situates agencies like FWS in an "uneasy tension" wherein discretionary actions to which any law applies are judicially reviewable to determine whether the use of that discretion has been 'arbitrary and capricious.' *See American Canoe Ass'n v. EPA*, 30 F. Supp.2d 908, 925 (E.D. Va. 1998). Policies like FWS's mitigation proposal serve the vital function of queuing and regularizing exercises of discretion throughout the agency. This can be especially important in ESA § 10 contexts involving multiple, often large-scale conservation plan-backed permits. Those

permits are to provide for the mitigation of impacts to the taxon to the "maximum extent practicable," a substantive standard that admits of disparate interpretations. Cf. Bldg. Indus. Ass'n v. State Water Res. Control Bd., 22 Cal. Rptr. 3d 128, 145 (Ct. App. 2005) ("[T]he maximum extent practicable standard is a highly flexible concept that depends on balancing numerous factors . . . [and] is a term of art, and is not a phrase that can be interpreted solely by reference to its everyday or dictionary meaning."). The standard makes it a challenge to balance a permittee's needs against the wider public interest in the adjudication. Having a coherent policy that explains the agency's broader goals and connects them to site- or taxon-specific actions can be critical. Finally, given the fact that once an ESA § 10 permit is issued, the permittee is assured of not having to supply any further mitigation because of changed circumstances, see 50 C.F.R. § 17.22(b)(5)(iii)(B) (2015), these are high stakes adjudications that merit the utmost care with the discretion being employed.

Secondly, FWS is often called upon to supply advice and technical expertise pursuant to NEPA. NEPA § 102(2)(C) provides that "[p]rior to making any detailed statement [Environmental Impact Statement], the responsible Federal official shall consult with and obtain the comments of any Federal which has

jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(2)(C). For FWS, as guardian of so many fish, wildlife, plant and habitat resources, this means a constant flow of requests for advice on how impacts can be mitigated. The Council on Environmental (CEQ) regulations implementing NEPA § 102(2) define "mitigation" very similarly to the hierarchy FWS has proposed. See 40 C.F.R. § 1508.20; 81 Fed. Reg. at 12395.

But NEPA consultations of this kind are often at the more preliminary stages of the "detailed statement" inquiry, stages where mitigation efforts are undertaken in order to avoid having to prepare the detailed statement at all. See, e.g., Council on Environmental Quality, Notice of Availability: Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3843, 3845 (2011). Here, again, mitigation commitments from third parties must be carefully scrutinized at conservation's very earliest stages because they are often not readily enforced after-the-fact. See, e.g., City of Blue Ash v. McLucas, 596 F.2d 709, 712 (6th Cir. 1979).

When an action agency finds its proposal will not result in a significant enough impact in the environment to necessitate a

"detailed statement" pursuant to § 102(2)(C), it issues a "finding of no significant impact" (FONSI). See 40 C.F.R. § 1501.4(e). Increasingly, it is these FONSI's themselves that are adopted on the basis of proposed "mitigation" measures which aim to reduce the impact of the subject action below the § 102(2)(C) "significance" threshold. And, increasingly, these mitigation promises have become the subject of federal court scrutiny. See, e.g., National Parks & Conserv. Ass'n v. Babbitt, 241 F.3d 722, 731-37 (9th Cir. 2001); Friends of Back Bay v. U.S. Army Corps of Eng'rs, 681 F.3d 581, 583-89 (4th Cir. 2012).

So-called "mitigated FONSI's," thus, often involve FWS in assessing the likely efficacy of proposed mitigation measures to lessen the impact of a proposal below a legal threshold, § 102(2)(C) "significance," which is, itself, a quagmire (so to speak). See, e.g., Jamison E. Colburn, *The Risk in Discretion: Substantive NEPA's Significance*, 41 *Colum. J. Envtl. L.* 1 (2016). CEQ regulations require some discussion of mitigation in the event a detailed statement is prepared. See 40 C.F.R. § 1502.14(f). But "mitigated FONSI's" can present much harder questions about what consequential mitigation entails, what level of certainty must obtain to the mitigation measures proposed, and who is responsible. Mitigation discussions in these contexts are not simply for information purposes, see

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989), but rather for purposes of ensuring every covered action that triggers the § 102(2)(C) threshold is in fact the subject of a "detailed statement" on its impacts and alternatives.

It is no doubt in the action agency's best interest (and, beyond the agency, any ostensible permittee's best interest) for FWS to have a consistent, justifiable approach to mitigation before offering its advice/consultation ad hoc. This is especially true where mitigation allowed to affect the NEPA threshold determination can be considered "off-site." See, e.g., Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 860-61 (9th Cir. 1982) (differentiating between mitigation actions that are on- versus off-site and project-related versus unrelated); People ex rel. Van de Kamp v. Marsh, 687 F. Supp. 495, 500-01 (N.D. Cal. 1988) (rejecting off-site mitigation lacking sufficient assurances by permittee that plan would be implemented as wrongly included in NEPA § 102(2)(C) "significance" threshold determination).

CEQ takes the position that mitigated FONSI's are appropriate only where sufficient legal authority and sufficient resources exist to conclude that mitigation-in-fact is likely to occur. In that event, though, CEQ also counsels agencies that the mitigation commitments "should be clearly described in the



mitigated FONSI document" and that "appropriate public involvement during the development of the . . . FONSI" are necessary to the "integrity of the NEPA process." Council on Envtl. Quality, Final Guidance, 76 Fed. Reg. at 3848. To whatever extent FWS's mitigation policy, through its hierarchy of needs, landscape-scale ambitions, coordination prompts, and substantive guidance on what constitutes actual, adequate mitigation of impacts to its "trust resources," improves the clarity of selected "means and measures," it will improve the action agency's threshold NEPA determinations and, presumably, the quality of its exercises of discretion.

#### **Conclusion**

In conclusion, the proposed policy on mitigation is an internal guidance document that aims to regularize agency uses of discretion, increase agency transparency, and connect individual cases in the field to broader agency priorities and agency expertise latent within the institution. The courts have repeatedly signaled in a variety of contexts that, in general, such actions are to be encouraged from administrative agencies. I see no reason to distinguish FWS's proposal from that broader inter-branch dynamic. I would like to thank Chairman Sullivan, Ranking Member Whitehouse and the rest of the Subcommittee again

for the opportunity to participate in today's hearing. It has been my pleasure to be with you today.

Senator SULLIVAN. Great.

Well, I again want to thank the panelists. You guys obviously are very knowledgeable on these issues, and you have thought about them, studied them in practice, been involved with them, so I appreciate you coming here and helping enlighten us.

Let me just kind of start with the basics.

We would all agree, and I will just ask each of you, that a permitting delay, and in Alaska, where it is notorious, for years and years and years of delays for important economic projects, but it is also throughout the country, would each of you agree that that is not in the national interest, nor is it what the statutes envisioned when they were passed, whether it was Endangered Species or any other provision?

Would you agree, Mr. Kindred?

Mr. KINDRED. I would agree. And it is difficult, and I don't know if it is just the cynic in me, to imagine a scenario where adding another layer of policies is not going to result—

Senator SULLIVAN. Well, I am going to get to that.

Mr. Yates, would you agree? The statutes weren't designed for 8-year delays on a project, correct?

Mr. YATES. Senator, I agree.

Senator SULLIVAN. Professor Colburn.

Mr. COLBURN. Absolutely, Mr. Chair.

Senator SULLIVAN. So let me ask, and I am going to get to the issue. You guys were very, all three of you very articulate on the existing authorities, which, again, I believe are very dubious, and I know at least two of the witnesses also believe that. But we had Mr. Bean here essentially saying, hey, don't worry, this is not an additional level of bureaucracy; this is not going to delay. Do you even remotely think that that is going to be the case? I am not saying he was being deceitful, but is there any conceivable way that a new issuance of this kind of guidance is going to make more efficient and timely the permitting decisions by the Federal agencies?

Mr. Kindred.

Mr. KINDRED. I don't see how it could. I mean, just realistically.

Senator SULLIVAN. Can you give just your experience and examples?

Mr. KINDRED. Well, Alaska is unique in the sense that, and Mr. Bean referenced this idea; well, the Corps works well because they have these mitigation banks that afford the opportunity to put some this up front. There are no mitigation banks currently in Alaska. The fact of the matter is that right now there is a great deal of uncertainty just to get Corps-approved mitigation permits. So I find it highly unlikely—given how much of Alaska land is wetlands and critical habitat—how adding this additional layer won't just result in greater delays and greater uncertainty.

Senator SULLIVAN. Mr. Yates, do you see this as Mr. Bean testified, that this is not an additional layer of bureaucracy; that this is going to speed things up; it is not going to delay? In your experience, do you think he is correct?

Mr. YATES. I would have to disagree. In my experience, I have yet to find a scenario where additional layers of bureaucracy and requirements from a Federal action agency have increased the effi-

ciency and reduced time and delays and costs related to a project being permitted and authorized.

Senator SULLIVAN. How about this issue of the Corps of Engineers, which obviously works very closely with Fish and Wildlife, coming out and essentially saying this is going to tax you guys too much; you are already overburdened? I mean, the sister agency is coming out and saying that this is going to delay projects.

Have you ever seen that before? To me, that is relatively remarkable that the Corps is essentially saying you don't need this, and it is going to delay things. The Corps of Engineers. This is not a Senator; this is a fellow agency. Have you ever seen anything like that in your practice, Mr. Yates, where the Corps has come out and said don't do it, it is a bad idea; or Mr. Kindred?

Mr. YATES. I think it is very telling when you have a sister agency or a land management agency criticize this type of a policy or rulemaking. I think their expertise and their thoughts should be weighed heavily by the authorizing committee here in Congress through this process of scrutinizing this type of Federal regulatory action.

Senator SULLIVAN. Mr. Kindred.

Mr. KINDRED. I agree. And I think probably another aspect of this is if I was working with the Corps I would be concerned about increasing the likelihood of litigation.

Senator SULLIVAN. Yes.

Mr. KINDRED. If you have the Corps coming to one conclusion on mitigation and a recommendation from the Fish and Wildlife Service that is adverse to that, how is that reconciled, and how does that result in greater litigation?

Senator SULLIVAN. Professor Colburn, let me ask you. You had some very insightful testimony as well, and I appreciated that. Your two colleagues there on the panel were very dubious, as am I, about the legal authority that the Fish and Wildlife Service has with regard to promulgating this policy when it clearly seems to be expanding what is in the statutory provision. You mentioned that it is just guidance, but as you know guidance actually matters; it matters in litigation, it matters in what these Federal agencies are empowered to do. We have had examples, the CD5 case in Alaska that delayed a really important project for the State and the country by well over 3 years where at the very end the Corps was going to approve a bridge permit. At the very end the Fish and Wildlife Service put a letter into the file, and it delayed it for 3 years.

So Mr. Bean was very nice about saying, hey, I am just giving advice; they don't have to listen, but they have power, whether it is guidance, whether it is their objection letters that can delay projects for years. I have seen this.

So can you talk to that a little bit? You ended your testimony with something that is really important. What can we do to make sure that we don't have Federal agencies that are delaying and delaying projects?

In my experience, most Federal agencies don't want to delay. To be perfectly honest, some do. I think the Secretary of Interior and the rest of the leadership in the Department of Interior wanted to kill that Shell project off the coast of Alaska. That is why it took 7 years, \$7 billion to get permission to drill one exploration well

in 100 feet of water. Outrageous. They wanted to kill it. They were successful. But I don't think that is the case most of the time.

What can we do, in your experience, and you have a lot, to help not cut corners, we all want to protect the environment, but not to have a 20-year permitting process for a mine in Alaska?

Mr. COLBURN. Mr. Chairman, I think that is the question here, and I think it is the question that the agency is trying to address; and it is obvious that opinions vary about how they did.

Senator SULLIVAN. But do you think that the additional guidance is not going to add to the delay, like the two other witnesses?

Mr. COLBURN. I think I would answer your question by pointing out that the delays in the examples you cite from Alaska are meeting at a single location, but they are beginning from many different sources, and if I were a general purpose agency like the Corps of Engineers, which under section 404 of the Clean Water Act is empowered to just make the ultimate determination on a permit, along with EPA, the reason I would take Fish and Wildlife Service's opinions so seriously is because they have the biologists necessary to make the best call, thumbs up or thumbs down, on a lot of the trust resources. And if they ignore what the Fish and Wildlife Service says, they do at their peril because the Clean Water Act is, as you know, Mr. Chairman, is so good at empowering parties outside of the Government to sue in the event they disagree with any permitting decision by the Corps.

So if we were to grease the skid, so to speak, at the early phases and take mitigation not so seriously, when it is actually a statutory factor that has to be considered and has to be weighed co-equal with the other factors, I think it would be speed that we are borrowing temporarily for a lot of these cases. It would ultimately contribute to legal uncertainty in one form or another.

Now, the other thing that I just wanted to respond to very quickly, what could Congress do to fix this, I think one of the sources of delay within the Fish and Wildlife Service is the fact that they have so many responsibilities and so little personnel to discharge them. And I know you have a thousand people a day asking you for money, but it strikes me that, in my experience with complex permitting problems like the one you referenced, the overwhelming culprit is the fact that there just isn't personnel, and there just aren't resources needed to answer some of these really technical questions.

Senator SULLIVAN. Great. Thank you; that is excellent testimony.

Senator WHITEHOUSE. So, in a nutshell, agency guidance is capable of speeding up the administrative process by making it clearer to the applicants and clearer to the participants what is expected from the get-go.

Mr. COLBURN. I agree, Senator Whitehouse. I think that especially for the Fish and Wildlife Service, an agency that is so often in the business of providing an expert opinion to another agency whose only process delays add to theirs, guidance of this kind, which is, after all, aimed only at subordinate Fish and Wildlife Service personnel, actually has a realistic chance of speeding things up.

Senator WHITEHOUSE. Mr. Kindred, to use a colloquial phrase, Alaska is kind of getting whopped by climate change, compared to

more southern locations. Your concern about how climate change gets factored into the Fish and Wildlife policies is that there not be unwarranted reliance on predictive models and that there not be speculation, and that there should be a documented cause and effect relationship based on predictable, reliable data that connects the data that is out there to the problem before the agency. And your concern is that if that is not there, you risk making an error.

Mr. KINDRED. That is part of my concern, yes.

Senator WHITEHOUSE. Now, what is the default proposition for you?

Mr. KINDRED. I guess I would like a little more clarity in the question.

Senator WHITEHOUSE. Well, you may get it wrong if you look at climate change data and try to use that data to predict exactly what the influence is going to be over time.

Mr. KINDRED. Right.

Senator WHITEHOUSE. And that is your concern, that you may get it wrong. But if you ignore climate change data, then you know you are going to be wrong, right? So the problem that I have is if you are concerned that the climate change data isn't secure enough for the agency to make a decision on, to me, that leaves you with the default proposition that you just ignore climate change. And particularly for somebody coming from Alaska that seems like a really implausible thing to ask the U.S. Fish and Wildlife Service to do based on the science.

So my question is what is the default proposition here? What should be the kind of baseline from which the Fish and Wildlife Service makes these decisions that involve plugging climate change data into their determination?

Mr. KINDRED. I think that may be an oversimplification of my position on this, and it is important to distinguish between what NMFS did in their listing of the bearded and ring seals, where they contradicted themselves and went from saying that century-long modeling wasn't reliable to it was with the polar bear. And the polar bear species, I think, is a great example of some of the flaws with Fish and Wildlife Service's approach. I don't think any reasonable person can disagree that although polar bears are currently healthy and abundant, it is difficult to look at climate change modeling, no matter how much weight you want to give it, and not come to the conclusion that sooner or later the species will be imperiled.

But part of the problem with Fish and Wildlife Service's approach to this is they came out, and they, one, acknowledged, even in listing the polar bear species as endangered, they lacked any authority to do anything about the only threat to the species, which is climate change.

More to my point, I guess my concern as an Alaskan is that Fish and Wildlife Service also acknowledges that there is nothing that is happening locally, whether it be industry or—

Senator WHITEHOUSE. Isn't it appropriate for the Fish and Wildlife Service to take into account outside factors that are putting pressure on a particular species and evaluating what additional pressures it can take? I mean, that is a known that they should put into their calculus, which is, based on our information, there

is going to be a real wipeout in the polar bear population coming up, and therefore the population that is likely to remain is what we have to work with, and that is the data that we—that doesn't seem to be unreasonable at all.

Mr. KINDRED. That is not unreasonable, but when you look at what the effect is, the way people are being asked to pay a price for climate change as it relates to polar bear species, our Alaskans, have very little to do about the climate change threat.

Now, if the Fish and Wildlife Service would have come out and said, you know what, we look at States with high populations like California, and we are going to regulate them and make them pay the price because they are actually far more responsible for the threat on polar bears than Alaska, I may come to a—

Senator WHITEHOUSE. But back to the question of climate change, your recommendation to the Fish and Wildlife Service would be get the best data you can, make the most reliable determination you can, not throw up your hands and do something you know is wrong unless there is a level of certainty.

Mr. KINDRED. To be perfectly candid, my recommendation to the Fish and Wildlife Service as they were going through this process was to announce that we are going to impose no regulations on Alaska. Not because it is just advantageous to me as an Alaskan, but because it sends the message to people—

Senator WHITEHOUSE. That would make Senator Sullivan so happy.

Mr. KINDRED. Well, no, but it sends the—

Senator WHITEHOUSE. I think we could end all these hearings if there could just be an Alaska exemption. He'd come home happy.

Mr. KINDRED. But from an environmental standpoint, I think it is more important to announce to the citizens of the United States that simply listing a species, knowing that you can't do anything to protect it, gives people the false sense that it is being protected. And that was my biggest problem. If they would have come out and said this is a problem for everybody, the citizens of the United States, the citizens of the world, and if they don't take action, then we are going to have problems with the polar bear species. But to give people the false sense of security and not have them acknowledge their culpability in it, to me, is wrong.

Senator WHITEHOUSE. Understood. But to put it simply, it is not your recommendation for the Fish and Wildlife Service to ignore climate change impacts.

Mr. KINDRED. It isn't.

Senator WHITEHOUSE. Thank you. My time is over.

Senator SULLIVAN. Chairman Inhofe.

Senator INHOFE. Well, thank you. I am sorry I had to leave. I was kind of hoping this wouldn't devolve into a climate committee, but I suspected it might.

You know, you are oil and gas up in Alaska, right? And we are in my State of Oklahoma. And what I would like to get from you, Mr. Kindred, is how would the new policy impact my State insofar as oil and gas are considered? I have two other areas I will be asking about, too, but thoughts on that?

Mr. KINDRED. Well, I apologize in advance; I don't know how intelligently I can speak about how this will affect Oklahoma only

given that we have so many unique issues that cause delays and increase costs and kill projects. I mean, I think to the extent that there are areas that are designated as critical habitat in Oklahoma, I think changing the policy and changing Fish and Wildlife Service's approach from effectively working and creating reasonable mitigation policies to this no net loss or net gain can only result in adverse impacts to industry.

Now, there is a separate question, academically, if that is OK, but from just oil and gas's perspective, it is hard for me to believe that this is going to be anything but increased costs, increased delays, and increased uncertainty.

Senator INHOFE. I agree with that.

Mr. Yates, you are also involved with the Farm Bureau, is that correct?

Mr. YATES. Yes, sir.

Senator INHOFE. And do you know Buchanan in Oklahoma?

Mr. YATES. Yes, sir.

Senator INHOFE. He talks about the things that affect adversely that farmers are concerned about, Tom Buchanan, not just in the State of Oklahoma, but throughout America, that it is the over-regulation of the EPA. Then they single out as No. 1 within those regulations, WOTUS. That is the No. 1 concern that he has. And the second thing is some of the endangered species and what is happening there.

Have you already addressed how this would affect farmers in terms of this new mitigation policy?

Mr. YATES. No, but I will try to expand on that. I think generally speaking, from the ag sector's perspective, be it if we are talking from additional regulatory requirements coming from the EPA concern to WOTUS, again, I think we have had a consistent dialog with this Committee about our concerns about that. But I think generally speaking we are trying to evaluate what these regulatory changes mean for ag producers not just in Oklahoma, but across the country. Generally speaking farmers are concerned with mitigation requirements which have ultimately led to the elimination of all ag use on these mitigated lands, and I think that is the general concern from the ag sector, is the reduction in use of these private lands for agriculture.

And while this is a problem for agriculture in general, I would say especially a problem that we are seeing impact new beginning and young farmers and ranchers that are trying to get started in the industry.

Last, I think the concern about loss of ag infrastructure when mitigation takes land out of production is continuing to provide concern, the lack of certainty for producers. This is what we hear that is keeping people up at night.

So, again, be it from the EPA, be it from proposals like the mitigation policy, these new requirements that are being created from these executive branch agencies are troubling, and I think in my testimony we have had a conversation about this already, but I think the scope in which the Fish and Wildlife Service mitigation policy expands the regulatory reach of that agency as it pertains to landscape level conservation, and these new broad authorities



that are largely undefined in statute is troubling, and I think that is a role for you, Mr. Chairman, and this Committee.

The Fish and Wildlife Service should have come to you. They should have said, we have a problem, we are seeking—we think that additional mitigation would be helpful for the agency to protect species. And if that is their position, they need to come up with a legislative proposal and work with Congress to make those changes and not go about it through executive fiat. I think that is the wrong approach, and we have a lot of concern with that.

Senator INHOFE. Yes, we understand that. Also, my State has a lot of DOD activity there. We have, of course, highway projects; we have a lot of Corps activities.

But what effect—any one of the three of you—would this have in terms of our Department of Defense facilities? We have five major ones in the State. Any comments, any thoughts about that? Are they mainly exempt from this? And what areas are they not? Are you conversant with that?

Mr. YATES. Unfortunately, I would be happy to get back to you with that question.

Senator INHOFE. OK. Thank you.

Senator SULLIVAN. Well, thank you, Senator Inhofe.

I am going to wrap up with just a few final questions. Again, I want to thank the panelists. You have been outstanding witnesses.

Just so we are clear in terms of your testimony, Mr. Kindred, Mr. Yates, you don't think that the no net loss net benefit policy that has been promulgated in the President's 2015 memo and in these new regs, that that has a statutory basis for them to do that, is that correct?

Mr. KINDRED. It does not.

Senator SULLIVAN. So they are exceeding their authority quite clearly, in your view.

Mr. KINDRED. Yes, Senator.

Senator SULLIVAN. And you agree with that, Mr. Yates?

Mr. YATES. In our opinion, they have gone well beyond their authority.

Senator SULLIVAN. And Professor Colburn, you disagree with that, or you didn't have an opinion on that?

Mr. COLBURN. I disagree, Mr. Chairman. I think that if you were looking for statutory authority, and because you are dealing with very broad statutory authorities, the programs that they implement and that this policy touches are very broad. I would look at the purposes sections of those statutes.

Senator SULLIVAN. But you are not troubled that the 26 statutes that they cite, there is nothing like that in the language they cite?

Mr. COLBURN. To be honest, Mr. Chairman, I think of NEPA section 101, where it talks about the authority and the continuing responsibility of all agencies of the Federal Government. I think of the Endangered Species Act section 7(a)(1) that says utilize the secretary, utilize all of your authorities in pursuit of the purposes of the Act. I think that is where the no net loss impetus is coming from.

Senator SULLIVAN. Just let me throw in a final question. Senator Cardin had mentioned the goals of transparent, more predictable and timeliness in terms of permitting. I agree with that. And Sen-

ator Whitehouse talked about the importance of coordinating better among Federal agencies.

Do you think that this policy is going to advance those goals?

Mr. Kindred.

Mr. KINDRED. I think it would represent the first time that a great deal was added to the regulatory rubric, and it resulted in more transparency and more efficiency. It will be the first time it has ever happened, in my experience.

Senator SULLIVAN. So your answer is no?

Mr. KINDRED. No.

Senator SULLIVAN. OK.

Mr. Yates.

Mr. YATES. I will keep it simple. No, sir.

Senator SULLIVAN. OK.

Professor Colburn.

Mr. COLBURN. I think the 1981 policy creates its own uncertainties, so my answer would be I think it has a realistic chance of improving clarity and transparency.

Senator SULLIVAN. Well, thank you, gentlemen. Outstanding testimony. Very much appreciate you being here.

This hearing is adjourned.

[Whereupon, at 4:24 p.m. the Committee was adjourned.]

